THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

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IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A. PAGE

Anna Eliza Kernaghan, deceased, In the Goods of .. 130
Arlow, Wilkinson *v.* Spence, deceased, *In re*.. .. 83

B.

Belfast Corporation, Dougan *v.* 137

C.

Clarke *v.* Harper and Robinson 162
County Court Judge (Acting) for County Tyrone, R. (Dungannon R.D.C.) *v.* .. 42
County Court Judge for Fermanagh R. (Robinson Devlin) *v.* 50

D.

Dougan *v.* Belfast Corporation 137

E.

E. E. L., an Infant, *In re* .. 56
Eglinton Bakery, Ltd., Luke *v.* 88

F.

Ferguson *v.* Ferguson .. 126

G.

Gallagher, R. (Lynn) *v.* .. 21
Gillespie & Glass, Londonderry Corporation *v.* .. 144

H.

Harper & Robinson, Clarke *v.* 162

K.

Kernaghan, Anna Aliza, In the Goods of 130

L.

Lennon & Northern Ireland Road Transport Board, *Re* 174
Londonderry Corporation *v.* Gillespie & Glass .. 144
Luke *v.* Eglinton Bakery Ltd. 88

M. PAGE

Maidment *v.* Maxwell .. 158
Maxwell, Maidment *v.* .. 158

N.

Newtownstewart Model Dairy, Ltd., R. (Moore) *v.* .. 94
Northern Ireland Road Transport Board, O'Neill *v.* .. 104

O.

O'Neill *v.* Northern Ireland Road Transport Board .. 104

P.

Portadown U.D.C., R. (Quinn) *v.* 1

R.

R. (Dungannon R.D.C.) *v.* County Court Judge (Acting) for Co. Tyrone 42
R. (Lynn) *v.* Gallagher .. 21
R. (Moore) *v.* Newtownstewart Model Dairy, Ltd. .. 94
R. (Quinn) *v.* Portadown U.D.C. 1
R. (Rainey) *v.* Recorder of Belfast 10
R. (Robinson Devlin) v. County Court Judge for Fermanagh 50
Railway and Road Transport Act (Northern Ireland), 1935, *Re ;* Lennon *v.* Northern Ireland Road Transport Board .. 174
Recorder of Belfast, R. (Rainey) *v.* 10

S.

Spence, deceased, *In re* Wilkinson *v.* Arlow and Another 83

W.

Wilkinson *v.* Arlow and Another, *In re* Spence, deceased 83

TABLE OF CASES CITED.

A. PAGE

A. & B. Infants, *Re* 68
Armytage *v.* Armytage .. 66
Att. Gen. for Alberta *v.* Cook .. 70
Att. Gen. for British Columbia *v.* Att. Gen. for Canada .. 27
Att. Gen. for Canada *v.* Att. Gen. for Alberta .. 27, 36
Att. Gen. for Canada *v.* Att. Gen. for Ontario 28
Att. Gen. for Manitoba *v.* Att. Gen. for Canada .. 26, 33, 34
Att. Gen. for Ontario *v.* Reciprocal Insurers 27

B.

B. *v.* B. 68
Barfield, *Re* ; Goodman *v.* Child .. 84
Barlow, *Re* 8
Barraclough *v.* Brown 4, 6
Bater *v.* Bater 69
Benaim & Co. *v.* L. S. Debono 166, 168
Birch *v.* Birch 54
Black *v.* Baird 167
Broadbent *v.* Shepherd .. 150

C.

Carroll (J. M.) An Infant, *Re* .. 68
Cedars Rapids Manufacturing & Power Co. *v.* Lacoste 122, 179
Chatenay *v.* Brazilian Submarine Telegraph Co. 172
Cooper *v.* Bockett 134

D.

Daniel *v.* McCarthy .. 51, 53
Delaney *v.* Delaney .. 85, 86
Deller's Estate, *Re* ; Warman *v.* Greenwood 86
De Montaigu *v.* De Montaigu .. 66

F.

Fermanagh Co. Co. *v.* Parker .. 5, 6
Fraser *v.* City of Fraserville 122, 179, 183

G.

Gallagher *v.* Lynn 98

H.

H. *v.* H. 70
Hamlyn & Co. *v.* Talisker Distillery .. 165, 167, 168, 172
Hawkins, *Re* ; Hawkins *v.* Argent 85
Herd *v.* Herd 70
Holmes *v.* Pipers, Ltd. .. 98

I. PAGE

Insurance Act of Canada, *Re* .. 27

J.

Jacobs *v.* Crédit Lyonnais 165, 167, 171, 172
James *v.* Cowan 30

K.

Kavanagh *v.* Glorney 152
Keyes *v.* Keyes and Gray .. 70

L.

Lazard Bros. & Co. *v.* Midland Bank 165
Le Mesurier *v.* Le Mesurier 64, 69
Lenders *v.* Anderson .. 165, 167, 170
Lloyd *v.* Guibert 172
Lord Advocate *v.* Jaffrey 69, 70
Lucas *v.* Harris 54
Lucas *v.* Chesterfield Gas and Water Board, *Re* .. 122, 179
Lymburn *v.* Mayland .. 34, 36

M.

McKenney *v.* Lord Mayo .. 91
McNeilly *v.* Transport Board .. 120
Mart *v.* Mart 68
Miller, *In re* 132, 135
Molloy *v.* Donegal Rly. Co. .. 91

N.

N. V. Kwik Hoo Tong Handel Maatschappij *v.* Finlay (James) & Co. 166, 167

O.

O'Driscoll *v.* Manchester Insurance Committee 53
O'Hara, *In re* .. 67, 81
O'Neill *v.* Northern Ireland Road Transport Board 179, 180, 181, 182, 183, 184

P.

Pasmore *v.* Oswaldthistle U.D.C. 5
Poulett Perrage, The 68
Powell *v.* Vickers, Sons & Maxim, Ltd. 160, 161

R.

PAGE

R. *v.* Committee Men for the South Holland Drainage .. 15
R. *v.* Eastern Terminal Elevator Co. 28
R. *v.* Leicester Union 8
R. *v.* Licensing Justices of Bristol 8
R. (McKenney) *v.* Co. Antrim J. J. 8
R. (McSwiggan) *v.* Londonderry J.J. 14
R. *v.* Nicholson .. 15, 16
R. *v.* Owen & Others 8
R. (Peacocke) *v.* Recorder of Dublin 16
R. *v.* Richmond Confirming Authority 15
R. *v.* Sharman .. 14, 15
R. *v.* Smith 8
R. *v.* Surrey J.J. 14
R. *v.* Williams 15
Ralli Brothers *v.* Compania Naviera Sota Y Aznar .. 166, 167
Robb *v.* Electricity Board for Northern Ireland 116
Royal Victoria Hospital *v.* London Guarantee & Accident Corporation, Ltd. 128
Russell *v.* The Queen 32, 33, 35, 36, 39, 98

S.

PAGE

Saffron Walden Second Benefit Building Society *v.* Rayner .. 152
Stathatos *v.* Stathatos .. 66
St. Helen's Corporation *v.* Kirkham 150, 151

T.

Thain, *In re* 68
Townsend *v.* Moore .. 134, 135

W.

W. *In re* W. *v.* M. 68
Wagstaffe *v.* Bentley 160
Wake *v.* Mayor of Sheffield .. 5
Ward, Infants, *In re* 67
Watts *v.* Battersea Borough Council .. 150, 151, 156
World's Tea Company *v.* Gardener 99

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

THE KING (QUINN) v. THE URBAN DISTRICT COUNCIL OF PORTADOWN (1).

K.B.D. 1937.

June 3.

Mandamus—Alternative remedy by appeal to County Court—Hall used for public dancing, singing, music, boxing and other public entertainments—Renewal of licence—Less than seven days previous notice of objections—Local Government Act (Northern Ireland), 1934, (24 & 25 Geo. 5, c. 22), section 31 (7), (11).

The prosecutor, the secretary of the C. D. Hall, situate in P., which had been duly licensed in accordance with section 31 of the Local Government Act (Northern Ireland), 1934, applied to the U. D. Council of P., the licensing authority, under said section for a renewal of the licence.

The prosecutor received notice from the Clerk of the Council that an objection had been taken to the renewal of the licence. The notice was less than the seven clear days required by the said section. Notwithstanding the protest of the prosecutor's solicitor the Council heard the objection and refused the application, neither the prosecutor nor his solicitor taking part in the hearing.

The prosecutor obtained a conditional order for a writ of mandamus to issue commanding the Council to grant a renewal of the licence.

On motion to make the conditional order absolute, notwithstanding cause shown,

Held, by the King's Bench Division (Brown, J., and Megaw, J.), that the Council had not given a proper notice as required by the

(1) In the King's Bench Division before Brown, J., and Megaw, J.

K.B.D. 1937.

THE KING (QUINN) v. THE URBAN DISTRICT COUNCIL OF PORTADOWN.

section, but that the prosecutor was not entitled to an order of *mandamus*, because he had another effective remedy, viz., by appeal to the county court, and that therefore the conditional order should be discharged.

MANDAMUS.

This was an application to make absolute, notwithstanding cause shown, a conditional order, dated the 12th February, 1937, for a writ of mandamus directed to the Urban District Council of Portadown commanding the Council to grant to the prosecutor, Charles J. Quinn, a licence for public dancing, singing, music, boxing or other public entertainments in respect of the building and premises known as " Classic Dance " Club," situate at Curran Street, Portadown, on the grounds that the sanitary authority in refusing the application acted contrary to law and without and in excess of jurisdiction and contrary to natural justice.

The conditional order was obtained on the affidavit of the prosecutor, Charles J. Quinn, who stated that he was the secretary of a hall, known as the " Classic " Dance Hall," situate in Curran Street, Portadown, County Armagh. This hall had been duly licensed in accordance with section 31 of the Local Government Act (Northern Ireland), 1934.

On the 24th December, 1936, he applied in writing to the Urban District Council of Portadown which is the sanitary authority for the Urban District of Portadown, and as such, the licensing authority under section 31 of the Act of 1934, for a renewal of the licence.

The prosecutor received a letter from the clerk of the Council, dated 16th January, 1937, stating that an objection had been raised to the renewal of the licence, and that the matter would be considered by the Council at a meeting to be held on the 20th instant. The prosecutor was invited to attend this meeting, to show cause why the grant of a renewal licence should not be refused by the Council.

The prosecutor with his solicitor attended this meeting. His solicitor referred the Council to section 31 of the Local Government Act (Northern Ireland),

1934, and protested against any objections being taken into consideration. He stated that the Council could not refuse to grant or renew the licence, as the prosecutor had not received not less than seven clear days notice in writing that objections had been made. The sanitary authority, nevertheless, decided to hear the objections and neither the prosecutor nor his solicitor took any further part in the proceedings. The sanitary authority then refused his application.

The letter of 16th January, 1937, was the first and only notice the prosecutor received though he had followed the procedure laid down by the section in making the application.

On 26th January, 1937, the prosecutor's solicitor received from the clerk of the Council a letter stating as follows :—

" Dear Sir,

" The Local Government Act (N.I.), 1934, section 31.
" Adverting to your letter of the 20th instant,
" and to the application of Mr. Charles J. Quinn,
" 36 Obins Street, for a dancing licence for the
" premises in Curran Street, described as the
" 'Classic Dance Hall,' this is to state that at their
" mid-monthly meeting, held on the same date,
" and at which you were present on behalf of the
" applicant the Council, after taking into considera-
" tion an adverse report from the District Inspector
" of the R.U.C., refused to renew the licence, on the
" grounds that the premises had not been properly
" conducted during the preceding twelve months, and
" had, in fact, been used on several occasions for
" unlawful purposes."

Sheil for the prosecutor :—

The relevant section is section 31 of the Local Government Act (Northern Ireland), 1934. I rely on sub-section (7) of that section. The net point is whether, not having given not less than seven days previous notice in writing that objections had been made to the licence, as required by section 31 (7), the Urban District Council is entitled to refuse or vary the licence. The Urban District Council were not entitled

K.B.D. 1937.

THE KING (QUINN) v. THE URBAN DISTRICT COUNCIL OF PORTADOWN.

to take objections to the licence into consideration as the prosecutor had not received the notice prescribed by the section. That is the only point on which I rely.

Murphy, K.C., and *Maginess* for the Urban District Council of Portadown :—

The prosecutor waived the point of the seven days notice by coming before the Council and being represented by a solicitor when objections to the renewal of the licence were being considered.

Section 31 (11) of the Act of 1934 gives a right to any person aggrieved by a decision of the sanitary authority refusing to renew a licence in respect of any premises, to appeal to the county court.

We submit that the prosecutor's proper course was to appeal to the county court.

We rely on *Barraclough v. Brown* (1), where it was held that where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction ; he can only take proceedings in the latter court.

We submit that the law is correctly stated by Lord Herschell in his speech in the House of Lords in that case (1), when he said : " I think it would be very " mischievous to hold that when a party is compelled " by statute to resort to an inferior court he can come " first to the High Court to have his right to recover— " the very matter relegated to the inferior court— " determined. Such a proposition was not supported " by authority, and is, I think, unsound in principle."

We submit that these words of Lord Herschell are very relevant to the present case.

Once the applicant for a licence receives notice of objection, he should in writing ask for an opportunity of being heard.

The writ of mandamus will not issue where there is another equally convenient remedy. Here, the prose-

(1) [1897] A.C. 615, 620.

cutor could have availed himself of a more convenient remedy, an appeal to the county court.

We rely on the words used by Best, L.J., in *Fermanagh County Council v. Parker* (1), where he said: "The general proposition that where a statute creates "an obligation and provides a remedy for enforcing "it, the only remedy is that pointed out by the statute "is well settled."

Best, L.J., in his judgment in that case cites this passage from the speech of the Earl of Halsbury, L.C., in the House of Lords, in *Pasmore v. Oswaldthistle Urban District Council* (2): "The principle that where a "specific remedy is given by a statute, it thereby "deprives the person who insists upon a remedy, of "any other form of remedy than that given by the "statute, is one which is very familiar and which runs "through the law."

Later on, in his speech, the Earl of Halsbury said: "The obligation which is created by this statute is "an obligation which is created by the statute and by "the statute alone. It is nothing to the purpose to "say there were other statutes which created similar "obligations, because all those statutes are repealed; "you must take your stand upon the statute in "question, and the statute which creates the obligation is the statute to which one must look to see "if there is a specified remedy contained in it. There "is a specified remedy contained in it, which is an "application to the proper Government department."

In principle the same considerations apply to the present case.

We also rely on *Wake v. The Mayor of Sheffield* (3), where the particular remedy was pointed out by the statute, and it being one for a grievance in respect of a new liability, it was the only remedy which could be taken.

We submit that in the present case the appeal to the county court is the exclusive remedy and the court should not grant this writ of mandamus.

(1) [1932] N.I. 153, 164.
(2) [1898] A.C. 387, 394.
(3) 12 Q.B.D. 142.

K.B.D. 1937.

THE KING (QUINN) v. THE URBAN DISTRICT COUNCIL OF PORTADOWN.

Sheil (in reply) :—

The order made by the Urban District Council was made without jurisdiction. An appeal to the county court presupposes that an order has been made which there was jurisdiction to make.

I submit that *Barraclough v. Brown* (1), and *Fermanagh County Council v. Parker* (2), have no application to the present case.

In *Fermanagh County Council v. Parker* (2), the right was new and had not previously existed before the passing of the Drainage Act (Northern Ireland), 1929.

In the present case there has been a restriction of the prosecutor's rights.

In the present case the Council had no authority to do anything other than to grant this licence.

BROWN, J.

BROWN, J. : This is an application by the prosecutor, Charles J. Quinn, for a writ of mandamus directed to the Urban District Council of Portadown commanding them to grant to the prosecutor a licence for public dancing, singing, music, boxing or other public entertainments in respect of the building and premises known as "Classic Dance Club," situate at Curran Street, Portadown.

This building had been duly licensed in accordance with section 31 of the Local Government Act (Northern Ireland), 1934.

On 24th December, 1936, the prosecutor applied in writing to the Urban District Council of Portadown, which is the sanitary authority for the Urban District of Portadown and as such the licensing authority under section 31, for a renewal of the licence.

The prosecutor received a letter from the clerk of the Council, dated 16th January, 1937, on 18th January, 1937, stating that an objection had been raised to the renewal of the licence, and that the matter would be considered by the Council at a meeting to be held on the 20th instant. The prosecutor was invited to attend this meeting, to show cause why the grant of a renewal licence should not be refused by the Council.

(1) [1897] A.C. 615. (2) [1932] N.I. 153.

The prosecutor with his solicitor attended this meeting. His solicitor referred the Council to section 31 of the Local Government Act (Northern Ireland), 1934, and protested against any objections being taken into consideration. He stated that the Council could not refuse to grant or renew the licence, as the prosecutor had not received not less than seven clear days notice in writing that objections had been made. The sanitary authority, nevertheless, decided to hear the objections and neither the prosecutor nor his solicitor took any further part in the proceedings. The sanitary authority then refused his application.

The prosecutor made the point that he had not received proper notice that objections had been made.

Sub-section 7 of section 31 of the Local Government Act (Northern Ireland), 1934, applies to the present application. That sub-section sets out very clearly the procedure to be followed. That procedure was not followed by the sanitary authority.

The sub-section provides that: "A sanitary authority "shall not refuse to grant, renew or transfer, nor shall "they revoke or vary, a licence to which this section "applies unless they have given to the person applying "for the grant, renewal or transfer, or holding the "licences proposed to be revoked or varied, not less "than seven days previous notice in writing that "objections have been or will be taken to such grant, "renewal or transfer, or that a revocation or variation "is proposed, and unless, on written application made "within seven days after the receipt of such notice, "they have afforded to such person an opportunity of "being heard against such refusal, revocation or "variation."

The prosecutor had a right to receive not less than seven clear days notice in writing that objections had been made. Undoubtedly, the sanitary authority did not follow the procedure prescribed.

This was the only point made on behalf of the prosecutor.

Sub-section 11 of section 31 of the Act of 1934 provides that: "Any person aggrieved by a decision "of the sanitary authority refusing to grant, renew

K.B.D. 1937.

THE KING (QUINN) v. THE URBAN DISTRICT COUNCIL OF PORTADOWN.

"or transfer, or revoking or varying, a licence under "this section in respect of any premises may appeal "to the county court having jurisdiction where the "premises concerned are situate, and the decision of "that court shall be final and conclusive."

That sub-section clearly gives a right of appeal to the county court. The prosecutor did not avail himself of this right of appeal. He applied for a writ of mandamus. An order of mandamus is an order of discretion.

BROWN, J.

The law is correctly stated in *O'Connor's Irish Justice of the Peace*, part I. (2nd edition), at page 363. There it is stated that: "It is well settled that where "there is a remedy equally convenient, beneficial and "effectual, such as certiorari *Rex v. Owen and* "*Others* (1); or appeal to quarter sessions *The Queen* "*v. Smith* (2); *Reg. v. Licensing Justices of Bristol* (3), "a mandamus will not be granted. This is not a rule "of law, but a rule regulating the discretion of the "court in granting writs of mandamus; and unless "the court can see clearly that there is another remedy "equally convenient, beneficial and effective, the "writ of mandamus will be granted, provided the "circumstances are such in other respects as to warrant "the granting of the writ." Per Hill, J., in *Re Barlow* (4), cited with approval in *Reg. v. Leicester Union* (5); and see judgment of Walker, L.J., in *Reg. (McKenney) v. Justices of Co. Antrim* (6).

In the present case there was a remedy open to the prosecutor of appealing to the county court. This is not a case in which the conditional order should be made absolute.

MEGAW, J.

MEGAW, J.: I agree and am glad it is not necessary to decide any questions arising under sub-section 11 of section 31 of the Local Government Act (Northern Ireland), 1934. An appeal to the county court would have been an equally convenient remedy. I also am

(1) [1907] 72 J.P. 60.
(2) [1873] L.R. 8 Q.B. 146.
(3) [1893] 68 L.T. 225.
(4) [1861] 30 L.J. (Q.B.) 271.
(5) [1899] 2 Q.B. 632, 639.
(6) [1901] 2 I.R. 133, 176.

of opinion that this conditional order should be discharged.

Solicitor for the prosecutor: *R. M. Cullen.*

Solicitor for the Urban District Council of Portadown: *G. Philip Girling.*

J. McC.

K.B.D. 1937.

June 3.

THE KING (RAINEY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM (1).

Licensing Law—New Licence—Increase of twenty-five per cent. of population—Whether city or ward—Certificate of Minister of Home Affairs—Effect of—Certiorari—Delay in bringing proceedings—Intoxicating Liquor Act (Northern Ireland), 1923, (13 & 14 *Geo.* 5, *c.* 12), *section* 9 (*c*), *Intoxicating Liquor Act (Northern Ireland)*, 1927, *section* 3 (6) (*iv*).

R. applied to the Recorder of B. under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by the Intoxicating Liquor Act (Northern Ireland), 1927, section 3 (6) (*iv*), for an ordinary licence for the sale of intoxicating liquor for consumption on or off the premises. He proved the extinction of two licences in the city and produced a certificate of the Minister of Home Affairs showing an increase of twenty-five per cent. in the population of St. A's Ward of the city in which ward the premises were situate.

The prosecutor objected to the certificate that it should show not only an increase in the ward but also a twenty-five per cent. increase in the population of the city.

The Recorder, after reserving judgment, held that the certificate was conclusive as to the twenty-five per cent. increase in the population of the ward but was not conclusive as to whether, for the purpose of such increase, the unit should be the ward or the city. He further held that the proper unit was the ward, and granted the licence, the applicant undertaking to expend on the premises a further large sum of money.

Nearly five months after the granting of the licence the prosecutor obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division, for the purpose of being quashed, the order made by the Recorder, on the grounds, (*a*) that the order was made without and in excess of jurisdiction; (*b*) that it was made without due regard to the provisions and requirements of the above-mentioned Acts; and, (*c*) that the order was made without any statutory or other authority.

In the meantime the applicant had spent on the premises a large portion of the money he had undertaken to expend and had entered into a contract for a further large expenditure.

On application to make the conditional order absolute, notwithstanding cause shown:

(1) In the King's Bench Division before Brown, J. and Megaw, J.

Held, by the King's Bench Division (Brown, J., and Megaw, J.), reversing the Recorder, that section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, meant that there must be an increase of at least twenty-five per cent. in the population of a city or town before a new licence could be granted, and that in addition, the licence could only be granted in respect of premises situate in the ward or district electoral division in which such increase in population had taken place.

Held, also, that as no step was taken by the prosecutor to obtain a conditional order for certiorari until nearly five months after the licence had been granted, the prosecutor was debarred by his delay from succeeding in his application, and that the conditional order should be discharged.

CERTIORARI.

Loughlin Roddy, the applicant, of 679 Upper Newtownards Road, Belfast, purchased the premises, 400 & 402 Donegall Road, Belfast, on 24th February, 1936, for the sum of £1,100. He expended the sum of £150 on reconstruction of the building with a view to its suitability as licensed premises and to meet the requirements of the police, and on repairs. After the grant of the licence and before the grant of the conditional order he entered into contracts with builders to expend the sum of £1,473 18*s.* 10*d.* in carrying out further improvements. Part of these improvements costing £785, he carried out in pursuance of an undertaking given by him in Court on the hearing of his application for a licence. He paid the sum of £800 for two licences which had been extinguished and surrendered by him in substitution for the new licence.

On 4th August, 1936, the applicant gave notice of his intention to apply at Quarter Sessions for a certificate entitling him to receive a licence to sell by retail on or off the premises all intoxicating liquor at the premises, 400 & 402 Donegall Road, Belfast. The application was for an ordinary licence under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by section 3 (6) (iv) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927. The premises for which the licence was required were, prior to the date of the application, used as a fish and chip shop. The Recorder of Belfast

K.B.D. 1937.

THE KING (RAINEY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

heard the application on 24th September, 1936, and reserved judgment.

At the hearing before the Recorder a certificate from the Minister of Home Affairs was produced certifying that he was satisfied that there had been an increase of population of not less than twenty-five per cent. in the St. Anne's Ward of the city of Belfast since the census ascertained next before the passing of the Intoxicating Liquor Act (Northern Ireland), 1923.

The prosecutor, the Reverend Robert Rainey, objected to this certificate on the ground that it did not comply with the requirements of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as it showed only an increase in the ward, but the certificate required by the Act should show that there was a general increase of twenty-five per cent. in the city as well as in the particular ward.

This section provides that: "where, owing to an "increase of not less than twenty-five per cent. of the "population according to the last census, there is a "growth or an extension of any city or town, and the "licensing authority is satisfied, after hearing any "evidence tendered to it by any resident or owner of "property in such city or town, that the restrictions "in this section on the granting of licences may be "relaxed, the licensing authority may grant a licence "to any applicant notwithstanding that the same would "be otherwise forbidden by this section: Provided "that such licence shall be granted only for premises "situate in the ward or district electoral division in "which such increase in population has taken place, "and in substitution for at least two existing licences "held in respect of premises situate within the city or "or town (as the case may be) comprising such ward "or district electoral division."

Section 3 (6) (iv) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, provides that: "The required increase of population shall be proved "by means of a certificate of the Minister of Home "Affairs that he is satisfied that there has been an "increase of not less than twenty-five per cent. since "the census ascertained next before the passing of "the Act of 1923."

The Recorder of Belfast gave judgment on 1st October, 1936, granting the application. He held that the applicant had satisfied the Court that there had been an increase of not less than twenty-five per cent. in the population of the ward in which the premises were situate, and that the proof consisted of the certificate of the Minister of Home Affairs which was conclusive of the existence of a twenty-five per cent. increase in the population of the ward but was not conclusive as to whether the proper unit should be the ward or the city.

The Recorder held that the unit was the ward in which the premises were situate and not the city, and that the provision as to population had been observed.

On 26th February, 1937, the prosecutor obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division, for the purpose of being quashed, the order made by the Recorder.

The grounds on which the prosecutor relied were (*a*) that the order was made without and in excess of jurisdiction, (*b*) that it was made without due regard to the provisions and requirements of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by section 3 (6) (iv) of the Intoxicating Liquor Act (Northern Ireland), 1927, and (*c*) that the order was void and illegal, and was made without any statutory or other authority.

The prosecutor applied to have the conditional order made absolute notwithstanding cause shown.

T. J. Campbell, K.C., E. S. Murphy, K.C., and *McSparran* for the applicant :—

The question to be decided is whether the increase of at least twenty-five per cent. of the population must be both in the ward and in the city generally.

The Recorder held that the proper unit was the ward and not the city. The words city and ward are both mentioned in the section. The increase was to be proved by the certificate of the Minister of Home Affairs. We submit that the certificate is final. Once this increase is proved by means of this certificate

K.B.D. 1937.

THE KING (RAINEY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

nothing more is required. There must be some growth or extension in the city and an increase of at least twenty-five per cent. in the ward, otherwise the intention of the Act of Parliament would be frustrated. The net result of this application was a reduction in the number of licensed houses in Belfast.

We submit that this is a case in which certiorari should not issue.

The granting of a writ of certiorari at the instance of a private person is a matter of discretion, and not *ex debito justitiae*. *The King* (*McSwiggan*) *v. Justices of Londonderry* (1). In *The Queen v. Justices of Surrey* (2), Blackburn, J., said, delivering the judgment of the Court: "It is quite clear that, except when "applied for on behalf of the Crown, the certiorari is "not a writ of course."

Later on in his judgment, Blackburn, J., said: "Where the applicant is not a party grieved (who "substantially brings error to redress his private "wrong), but comes forward as one of the general "public having no particular interest in the matter, "the Court has a discretion, and if it thinks that no "good would be done to the public by quashing the "order, it is not bound to grant it at the instance of "such a person."

In *The Queen v. Sharman* (3), the Court refused the application for the writ of certiorari on the ground that the applicant had "not made out that he was "aggrieved in such a sense as to give him a right to "this remedy."

The prosecutor is debarred by his delay from succeeding in his application.

In *The King* (*McSwiggan*) *v. Justices of Londonderry* (1), Holmes, L.J., said in his judgment: "I also "accept the proposition that a person whose rights "may be affected by an illegal or invalid order of an "inferior Court, or who may be otherwise prejudiced "thereby, is entitled to have the order quashed, *unless*

(1) [1905] 2 I.R. 318, 323.
(2) L.R. 5 Q.B. 466, 472, 473.
(3) [1898] 1 Q.B. 578, 579.

" *he is precluded by his conduct or by delay from making* " *the application.*"

To the same effect are the words used by Wright, J., in his judgment in *The Queen v. Sharman* (1), where he said: " Lastly, the action on the part of the magis- " trates which is complained of took place on August " 23rd, and the order *nisi* for a *mandamus* was not " moved for until December. Under such circum- " stances as those of the present case a mandamus " ought not to be granted, unless the motion is made " at as early a period as conveniently can be after the " occurrence of the circumstances relied on in support " of the application."

In *The King v. Richmond Confirming Authority* (2), delay is mentioned as a ground on which certiorari ought not to go (1).

In *The Queen v. Nicholson* (3), A. L. Smith, L.J., refers to delay as a ground on which certiorari ought not to go.

[They also referred to *The King v. Williams* (4), and *The Queen v. The Committee Men for the South Holland Drainage* (5).]

Beattie, K.C., and *Copeland* for the prosecutor:—

The intention of the Act was to reduce the number of licences. Increase of population can only mean increase of population of the city as a whole. If the meaning sought to be put upon the sub-section on behalf of the applicant is correct then no effect would be given to the first part of the sub-section. The onus is on the applicant to bring himself within the sub-section.

The certificate of the Minister of Home Affairs is of no service whatever in the circumstances of the present case, where the proviso is never reached.

The law is not to be misinterpreted because the application is made by a private individual.

(1) [1898] 1 Q.B. 578, 581.
(2) [1921] 1 K.B. 248, 255.
(3) [1899] 2 Q.B. 455, 470.
(4) [1914] 1 K.B. 608.
(5) 8 Ad. & E. 429.

K.B.D. 1937.

THE KING (RAINEY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

The applicant was not prejudiced in any way by any delay that took place.

Before the applicant had obtained the licence, he had spent £1,250. He took his chance.

It is the duty of this Court to keep inferior Courts in order. As was said by Palles, C.B., in *The King (Peacocke) v. Recorder of Dublin* (1) The Court's jurisdiction in certiorari is "to keep the inferior courts "within the limits of their jurisdiction."

The conditions of the exception have not been observed. This error on the part of an inferior court cannot be allowed to go unchecked.

In the circumstances of the present case the motion for a writ of certiorari was brought promptly.

The question before the Court is, was this order made without jurisdiction, or was it not.

Even if there was some delay, the matter is of such outstanding importance, that we are entitled to have this question of whether or not the conditions of the Act of Parliament have been complied with, decided.

E. S. Murphy, K.C. (in reply):—

We suggest that since 1902 no city or town in Northern Ireland, except perhaps Bangor, has increased its population by twenty-five per cent. If the arguments urged on behalf of the prosecutor as to the meaning of the sub-section are correct, a great many licences must have been granted on a wrong interpretation. Before a new licence could be granted in the city of Belfast, there would have to be an increase of population of at least 100,000. These arguments would seem to lead to an absurdity.

There is an increase of well over twenty-five per cent. in the population of the particular ward. The proviso to the sub-section shows that the Legislature contemplated an increase of at least twenty-five per cent. in the population of a particular part of the city.

In *The Queen v. Nicholson* (2), Vaughan Williams, L.J., in his judgment, refers to delay as a matter which should influence the decision of the Court.

(1) 3 N.I.J. 252. (2) [1899] 2 Q.B. 455, 472.

The application in the present case was certainly not made promptly.

A stronger case against the exercise of discretion to grant a writ of certiorari could not be imagined.

BROWN, J.: We have decided in this case to give judgment at once as we think there is no object to be served in reserving judgment.

The Intoxicating Liquor Act (Northern Ireland), 1923, was clearly a measure for the reduction of licences in Northern Ireland.

Section 9 of that Act provides that "from and after "the passing of the Act no licence shall be granted for "the sale of intoxicating liquor, whether for con- "sumption on or off the premises, except (i) for "premises which are lawfully licensed at the date of "the passing of the Act, or which were lawfully "licensed at any time since the first day of January, "1920; or (ii) for an hotel; or (iii) for a railway "refreshment room." Sub-section (*c*) of this section contains, however, an exception to the rule. It provides that "where, owing to an increase of not less "than twenty-five per cent. of the population according "to the last census, there is a growth or an extension "of any city or town, and the licensing authority is "satisfied, after hearing any evidence tendered to it "by any resident or owner of property in such city "or town, that the restrictions in this section on the "granting of licences may be relaxed, the licensing "authority may grant a licence to any applicant "notwithstanding that the same would be otherwise "forbidden by this section: provided that such licence "shall be granted only for premises situate in the ward "or district electoral division in which such increase in "population has taken place, and in substitution for "at least two existing licences held in respect of "premises situate within the city or town (as the case "may be) comprising such ward or district electoral "division."

I have come to the conclusion that the Recorder was wrong in his interpretation of the section. I think the meaning of the section is that there must be an

K.B.D. 1937.

THE KING (RAINEY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

BROWN, J.

increase of at least twenty-five per cent. in the population of the city or town before a new licence could be granted. In addition, the licence can only be granted in respect of premises situate in the ward or district electoral division in which such increase in population had taken place.

There is, however, another factor in the present case. The licence was granted on 1st October, 1936. Mr. Roddy went to certain expenses in the purchase and repair of the premises, and had given an undertaking before the Recorder that he would spend other monies upon the premises. In fact, before any step was taken to set aside the licence Mr. Roddy had spent £785 and had entered into a contract to spend an additional sum of £1,500. It would be grossly unfair to Mr. Roddy if, after allowing him to spend that money over a five months period, the prosecutor could come in and take away his licence. No step was taken by the prosecutor until nearly five months after the licence had been granted.

The prosecutor is debarred by his delay from succeeding in his application. The conditional order will, therefore, be discharged.

MEGAW, J.

MEGAW, J.: There are two points for decision in the present case. The first is as to the construction of section 9 (c) of The Intoxicating Liquor Act (Northern Ireland), 1923. The intention of the Act was clearly to prevent the creation of new licences. This has been the policy of the Legislature since the Act of 1902 which was at first intended to operate for five years, but the provisions of that Act were kept in force until the Northern Ireland Act of 1923 by the provisions of the Expiring Laws Continuance Act. With some verbal changes (" parish " in a proviso being replaced by " ward or district electoral division ") the restriction on licences imposed by the Act of 1902 was re-enacted in permanent form by the Northern Ireland Act, 1923. section 9 (*c*).

It is to be observed that in neither Act has there been any provision for granting new licences in rural areas. Some argument was based on the construction

of the 1902 Act. In my opinion what we have got to do is to construe the wording of the 1923 Act in its natural meaning. In my opinion there is no ambiguity in it. The proviso, no doubt, refers to a ward or district electoral division, but this proviso is subject to the enactment contained in the earlier part of the sub-section.

It is a condition precedent to any new licence being granted that there should be the "growth or an "extension of any city or town" shown by an increase of population of twenty-five per cent. Legislation by implication is not to be favoured. Words are not to be read into an Act of Parliament unless it can be shown that it is necessary to do so, that it was the clear intention of the Legislature that such words should be read into the expressed words. In my opinion it is inadmissible to read into the existing clause where "city or town" is referred to the words occurring in the proviso. These words, in my opinion, merely indicate the location in which the newly licensed premises shall be when the condition precedent of increase of population of the town has been established. I entirely agree on this point of construction of this sub-section with the judgment which has already been pronounced by my colleague, Mr. Justice Brown. It is a condition precedent to the grant of a new licence that there should be an increase of twenty-five per cent. over the whole city.

I cannot accept the argument of Mr. T. J. Campbell, K.C., that the certificate of the Minister of Home Affairs is final. It was clearly based on a misconception of the law as we have stated it.

I have had more difficulty with the question of delay. There are very special circumstances in the present case. The delay has been great. The applicant has incurred substantial expenditure openly and to comply with the police requirements. The cases cited as regards the consequences of delay on the part of an individual member of the public who seeks redress are convincing, and in my opinion govern our decision

K.B.D. 1937.

THE KING (RAINEY) *v.* THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

MEGAW, J.

here. Consequently, I agree also on this point with Mr. Justice Brown.

The conditional order must be discharged.

Solicitors for the applicant: *Joseph Donnelly & Co.*
Solicitor for the prosecutor: *Samuel Henry.*

J. McC.

THE KING (LYNN) v. GALLAGHER (1).

H.L. 1937.

June 10, 11. July 19.

Milk and Milk Products Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, *c.* 16), *sections* 1 (1) (*c*), 2 (2), 8 (1), 9 (1)—*Statutory Rules and Orders of Northern Ireland*, 1934, *No.* 71, *Regulations* 5, 6, 7, 8, 9, 22 (1), (4)—*Licence for sale of milk—Licence not obtainable by persons whose land or premises are outside Northern Ireland—A law not in respect of trade, but for peace, order and good government in respect of precautions to secure health of inhabitants—Validity of Act—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *section* 4 (1), (7).

The Milk and Milk Products Act (Northern Ireland), 1934, provides that a person shall not sell milk except under and in accordance with the Act (section 1 (1) (*c*); that a person shall not sell milk of grade A, B or C, (defined by the Act) unless he holds either a producer's or a distributor's licence (section 2 (1)); that the Ministry of Agriculture shall on application made in the prescribed manner grant to any person on the prescribed conditions a licence, and that the holder of a licence shall keep milk records and furnish such returns as the Ministry may require and permit the records to be inspected by an authorized officer (section 2 (6)). The Act further provides that an authorized officer shall have power to enter and inspect at any reasonable time any part of the land or premises occupied by the holder of a licence in connection with his business and examine milk found there and take samples (section 8 (1)). Power to make regulations is given to the Ministry of Agriculture by section 9 (1).

Regulations governing the production and sale of milk of grade C quality were made by the Ministry (S. R. & O., Northern Ireland, 1934, No. 71). These regulations provide that a producer shall permit any authorized officer at any reasonable time to inspect the herd and examine all premises and equipment used by the producer in connection with the production or sale of milk (regulation 5), and contain other provisions as to things to be done and powers to be exercised on the premises (regulations 6, 7, 8, and 9). There is a regulation that the Minister before granting a producer's licence shall satisfy himself that the applicant's arrangements for dealing with milk—that is arrangements for the production, handling, storage, treatment, and distribution of milk—are such as will enable him to comply with the provisions of the Act and regulations (regulations 22 (1) and (4)).

(1) The speeches in the House of Lords are printed from Messrs. W. B. Gurney, Sons & Funnell's shorthand notes.

H.L.
1937.

THE KING
(LYNN)
v.
GALLAGHER.

The appellant was one of several farmers whose farms are situate in County Donegal, outside the territory of Northern Ireland. He was convicted at the Londonderry Petty Sessions for having sold milk in the City of Londonderry otherwise than in accordance with the above Act.

He appealed from that decision to the Recorder of Londonderry who affirmed the decision of the justices on the ground that section 2 of the Milk and Milk Products Act (Northern Ireland), 1934, requiring a licence for the sale of milk in Northern Ireland applies to milk coming from outside Northern Ireland even where the producer had not obtained a licence to sell milk in Northern Ireland.

The appellant appealed to the Court of Appeal in Northern Ireland by virtue of section 50 of the Government of Ireland Act, 1920, and section 1 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2).

The Court of Appeal (1) dismissed the appeal and the appellant appealed to the House of Lords.

The House of Lords (2) affirmed the judgment of the Court of Appeal, holding (*a*) that the Milk and Milk Products Act (Northern Ireland), 1934, must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory, and (*b*) that the true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland ; and in those circumstances though it may incidentally affect trade with County Donegal, it is not passed "in respect of trade and does not offend against the express limitations imposed by section 4 (1), (7) of the Government of Ireland Act, 1920.

Order of the Court of Appeal in Northern Ireland (3) affirmed.

APPEAL from an order of the Court of Appeal in Northern Ireland (4) affirming a decision of the Recorder of Londonderry in favour of the respondent upon an appeal fron an order made by the justices of the petty sessions district of Londonderry.

The Recorder of Londonderry had dismissed the appellant's appeal from a conviction by the justices of the county of the city of Londonderry for selling milk in the city of Londonderry without a licence contrary to section 1 (1) (*c*) of the Milk and Milk Products Act (Northern Ireland), 1934, and ordering him to pay a fine of 1*s.* and £1 costs.

(1) Reported [1936] N.I. 131.
(2) *Present*: Lord Atkin, Lord Thankerton, Lord MacMillan, Lord Wright and Lord Maugham.
(3) [1936] N.I. 131.
(4) [1936] N.I. 131.

The appeal involved questions as to the construction and validity of the Milk and Milk Products Act (Northern Ireland), 1934.

The appellant was Mr. Samuel Gallagher, a dairy farmer, of Bogay, County Donegal, Irish Free State, and the respondent was Mr. William Lynn, district inspector, Royal Ulster Constabulary, who had been the complainant on the summons.

There were two questions to be decided in the appeal (*a*) whether the Milk and Milk Products Act (Northern Ireland) 1934, imposes control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland, and (*b*) whether the provisions of this Act came within the limitations imposed by section 4 (1) (7) of the Government of Ireland Act 1920, and were therefore beyond the powers of the Parliament of Northern Ireland.

The Milk Act provides that a person shall not sell milk except under and in accordance with the Act, section 1 (1) (*c*); that a person shall not sell milk of grade A, B or C (defined by the Act) unless he holds either a producer's or a distributor's licence, section 2 (1); that the Ministry of Agriculture shall on application made in the prescribed manner grant to any person on the prescribed conditions a licence, and that the holder of a licence shall keep milk records and furnish such returns as the Ministry may require and permit the records to be inspected by an authorized officer, section 2 (6). The Act further provides that an authorized officer shall have power to enter and inspect at any reasonable time any part of the land or premises occupied by the holder of a licence in connection with his business and examine milk found there and take samples, section 8 (1).

Power to make regulations is given to the Ministry of Agriculture by section 9 (1). Regulations governing the production and sale of milk of grade C quality, were made by the Ministry (S.R. and O. Northern Ireland, 1934, No. 71.)

These regulations provide that a producer shall permit any authorized officer at any reasonable time

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

to inspect the herd and examine all premises and equipment used by the producer in connection with the production or sale of milk (regulation 5), and contain other provisions as to things to be done and powers to be exercised on the premises (regulations 6, 7, 8, 9.)

There is a regulation that the Minister before granting a producer's licence shall satisfy himself that the applicant's arrangements for dealing with milk—that is arrangements for the production, handling, storage, treatment, and distribution of milk—are such as will enable him to comply with the provisions of the Act and regulations, regulations 22 (1) and (4).

The appellant was one of several farmers whose farms are situate in County Donegal outside the territory of Northern Ireland. For a considerable time before the passing of the Act they had been in the habit of selling their milk in the city of Londonderry.

The Recorder of Londonderry had affirmed the decision of the justices on the ground that section 2 of the Milk and Milk Products Act (Northern Ireland) 1934, requiring a licence for the sale of milk in Northern Ireland applies to milk coming from outside Northern Ireland even where the producer had not obtained a licence to sell milk in Northern Ireland.

The appellant appealed to the Court of Appeal in Northern Ireland by virtue of section 50 of the Government of Ireland Act 1920, and section 1 of the Irish Free State (Consequential Provisions) Act 1922 (Session 2).

The Court of Appeal dismissed the appeal and the appellant appealed to the House of Lords, by leave of the House.

J. M. Whitaker, K.C. and *C. A. Nicholson* for the appellant :—

It may be that the legislature of Northern Ireland desired to benefit the health of the people, but the special system of a licensing Act was adopted for carrying out that object. The inevitable result of this legislation was that no person whose farm was

situate outside Northern Ireland could import milk into Northern Ireland for human consumption. Whatever the purpose is, if the effect of the Act must be to take away the right of importing milk into Northern Ireland, then it is in respect of trade, and it is not permitted.

We also say that the Act does not apply to the appellant at all.

If the Milk Act was affecting the right of people outside Northern Ireland to carry on that trade with Northern Ireland then it would be affecting something in the nature of the status of persons outside Northern Ireland, or their civil rights.

The British Government for the time being reserved something to themselves and said: "We are not "going to give power to either portion of Ireland "to legislate in any manner which will affect the civil "rights of the other part to trade with them. We "will reserve that to ourselves." The distinction, as it were, is between mere municipal regulations and other things.

What is said is "if you are going to have any "statute which affects the right of people to trade "with any place outside your jurisdiction, we, the "English Parliament, will deal with it, but if you want "any regulations which merely control the mode, "without discrimination between the people outside "and the people inside Northern Ireland, then you "can pass them yourselves." What this Act says in effect, is, even although your milk be of the quality Grade A, Grade B, or Grade C, still you cannot sell it in Northern Ireland.

We submit, that if upon a true view of the entirety of the Act, it is found that in reality the legislation invades the existing rights of traders with Northern Ireland or encroaches on the class of things which are reserved to the Imperial Parliament, then even although the Act is passed solely for Northern Ireland purposes, and is applicable only to the Northern Ireland jurisdiction, it is *ultra vires*.

It has to be borne in mind that this is a licensing Act, and when such an Act is considered, the position

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

is that a certain class of persons, and indeed everybody before the passing of the Act, has a right to sell a commodity, or to trade with a particular portion of the country in that commodity. This Act deprives the people of that right, and the sole right of sale is vested in a certain privileged class of persons. The Act says that the privileged class is confined to people who have their farms or who carry on their business in Northern Ireland. This is an encroachment on the rights of traders, and it is a matter which is reserved. Conditions are imposed which make it impossible for the appellant to join in the trade. This is an encroachment on the right of trading, and it is an encroachment directed against the appellant.

Further, it not only involves the appellant's rights, but it encroaches upon the power that is reserved to the Imperial Parliament.

The Parliament of Northern Ireland are trying to do indirectly what they could not do directly. They are depriving the appellant of the right by making it impossible for him to fulfil the conditions for a licence.

The provisions of the Act which define the class of persons who are entitled to become the privileged persons, are not merely incidental provisions, but they are the pith and substance of the Act.

We submit that the principle applicable is stated in the case of *Attorney-General for Manitoba v. Attorney General for Canada* (1). We rely on the words used in that case by Viscount Summer in delivering the judgment of the Privy Council when he said: "The "matter depends upon the effect of the legislation not upon its purpose." Later on in the judgment Viscount Summer said: "It is not permissible to do "indirectly what cannot be done directly."

Where there is full sovereignty, the Act must be taken as it stands and construed accordingly, and the purpose or object must be construed from the words of the Act, but in the case of a subordinate legislature, the extent of the subordinate powers must be carefully considered. These subordinate powers are to be found in another statute, and consideration must be

(1) [1929] A.C. 260, 268.

given not to the form, but to the substance, so as to see what in fact will be the result of the Act, and whether it will do something which the legislature is prohibited from doing.

This Act affects the rights of persons outside Northern Ireland to trade with persons in Northern Ireland, this was a civil right possessed and enjoyed prior to this Act.

We rely on *Attorney General for Canada v. Attorney General for Alberta* (1) where Viscount Haldane in delivering the judgment of the Privy Council said: "Their Lordships think that as a result of these "decisions it must now be taken that the authority "to legislate for the regulation of trade and com- "merce does not extend to the regulation by a licensing "system of a particular trade in which Canadians "would otherwise be free to engage in the provinces."

We rely on the words used by Duff, J., in delivering the judgment of the Privy Council in *Attorney General for Ontario v. Reciprocal Insurers* (2).

We also rely on *In re Insurance Act of Canada* (3).

In the case of the *Attorney General for British Columbia v. Attorney General for Canada* (4) Lord Atkin in delivering the judgment of the Privy Council quoted a judgment of the Chief Justice of Canada, and afterwards said: "Their Lordships agree with "this, and find it unnecessary to add anything." In his judgment the Chief Justice said (5): "The en- "actments, in question, therefore, in so far as they "relate to matters which are in substance local and "provincial are beyond the jurisdiction of Parliament. "Parliament cannot acquire jurisdiction to deal in the "sweeping way in which these enactments operate "with such local and provincial matters by legislating "at the same time respecting external and inter- "provincial trade and committing the regulation of "external and inter-provincial trade and the regula- "tion of trade which is exclusively local and of traders "and producers engaged in trade which is exclusively

(1) [1916] 1 A.C. 588, 596.
(2) [1924] A.C. 328, 337.
(3) [1932] A.C. 41.
(4) [1937] A.C. 368, 387.
(5) [1936] Can. S.C.R. 412.

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

"local to the same authority: *The King v. Eastern "Terminal Elevator Co.* (1)." In other words, because they have been dealing with the position of persons carrying on trade whose premises are within the territory, that does not give them a right, to bring in persons who are carrying on trade from outside extra-provincially, and that when they include that, then one must consider, not had they power to legislate with respect to those within the province, but had they power to extend it so as to apply to those without the province.

We submit that in the present case if the appellant does not come within the Act at all, the Act is *ultra vires.*

We rely on the words used by Lord Atkin in delivering the judgment of the Privy Council in *Attorney General for Canada v. Attorney General for Ontario* (2) where he said: "It is not necessary that it should "be a colourable device, or a pretence. If on the true "view of the legislation it is found that in reality in "pith and substance the legislation invades civil "rights within the Province, or in respect of other "classes of subjects otherwise encroaches upon the "provincial field, the legislation will be invalid."

In the present case we submit that "in pith and substance" this is legislation, in respect of trade with a place out of this part of Ireland. Our contention is only that in so far as it extends to trade outside it is void, we are not concerned with it otherwise.

Alternatively, we submit that the appellant does not come within the Act at all, and therefore does not require a licence.

In applying the various cases which are the only relevant cases, namely the Canadian cases and the Australian cases, and "the pith and substance" principle, care must be taken to see that the Constitution of Northern Ireland lies in the same category as those other Constitutions, and that the principle can be applied equally in the case of Northern Ireland. "The pith and substance" principle seems to emerge from a veritable vortex of legislation, and it seems to

(1) [1925] Can. S. C. R. 434. (2) [1937] A.C. 355, 367.

spring from what has been called the competing authority of sections 91 and 92 of the British North America Act which have also been described as interlacing, and if those sections are looked at, it is obvious that in many respects they run into one another.

The Constitution of Northern Ireland is very different from the Constitutions of Canada and Australia. The Parliament of Northern Ireland is given specific powers and cannot exceed those powers. The intention of the Government of Ireland Act was to provide for the better Government of Ireland as a whole. In approaching section 4 of the Government of Ireland Act it is necessary to bear in mind the intention of the Legislature. The Legislature intended to set up a restriction which would prevent the growth of any obstacle towards union, and that so far as matters like trade were concerned, the legislation throughout the entire country should be uniform. It intended that as regards any substantial branch of trade, such as the milk trade, there should not be varying legislation in Northern Ireland and Southern Ireland.

It has to be shown that this Milk Act is for the "peace, order, and good government" of Northern Ireland and that it relates to transactions within the territory of Northern Ireland. The right to legislate for all matters, whether local or general, is still in the sovereign Parliament, the Imperial Parliament. There is no sovereignty in the Parliament of Northern Ireland, even where local matters are concerned. The Imperial Parliament still possesses authority to pass legislation even on matters on which the Parliament of Northern Ireland has power to legislate. This distinguishes the present case from the Canadian cases, and the Australian cases, and leaves it open to interpret section 4 of the Government of Ireland Act 1920 much more strictly.

We submit that the meaning of section 4 (1) (7) of the Government of Ireland Act 1920 is that the Imperial Parliament intended to remove trade from the compass of the Northern Ireland Legislature.

We submit that what was aimed at by the subsection was to prevent the very type of legislation

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

which has been passed here. It was intended to prevent one of the essential features of that legislation, the exclusion of outside goods.

It is not as though the Parliament of Northern Ireland were frustrated. It so happens that that Parliament has not got this power, and to get it the aid of the Imperial Parliament must be sought. This particular power of excluding goods has not been given to the Parliament of Northern Ireland. If that is not the meaning of sub-section (7) it is difficult to understand the powers that are given in relation to the prevention of contagious disease, or taxation, or to prevent outside traders from committing frauds on home traders.

Another aspect of the matter is discrimination, we submit that there is a reservation to the Imperial Parliament as regards trade, meaning the passage of goods of a particular class, and of a substantial class such as milk for human consumption either from England or the Irish Free State to Northern Ireland, and by that reservation, if there is any discrimination against outside goods, the legislation is *ultra vires*. In its " pith and substance " in the Act it is the origin that is struck at, and it is only home produced goods that can be sold. That is the effect of the Act, when origin and not quality is the test, that amounts to a discrimination against outside goods or outside people. It is *ultra vires*, and it is in respect of trade.

As to the passage from the judgment of the Privy Council delivered by Lord Atkin, in *James v. Cowan* (1) which was relied on in the Court of Appeal in Northern Ireland, we submit that the respondents could only rely on this statement of the law if there was substituted the words : " if the primary object was not directed " to trade, but to such matters as regulations solely " for the purpose of eliminating contagious disease," or any of those excepted matters. The very fact of the existence of those broad lines within which the legislation may be good, indicates the ambit of their powers, and that anything outside is bad.

For these reasons we submit that the appeal should be allowed.

(1) [1932] A.C. 542, 559.

The Attorney General (*Sir A. B. Babington, K.C.*), *MacDermot, K.C.* (*with them J. Gerald Dougherty*), for the respondent :—

Before dealing with the real essence of the case, it is necessary to get out of the way one or two subsidiary matters. First of all, it was contended on behalf of the appellant that the construction of the Government of Ireland Act 1920 should be related to the intention of the Imperial Parliament to provide for the eventual approximation of the Parliaments of Northern Ireland and Southern Ireland. The history of the government of Ireland in this century gives a conclusive answer to that contention, because the Act of 1920 was the second Act in this century dealing with the better government of Ireland. In 1914 an Act was passed which provided for the establishment in Ireland as a whole of a form of government similar to the form of government that was afterwards in 1920 conferred upon Northern Ireland and Southern Ireland. There was no distinction in that Act between Northern Ireland and Southern Ireland, and yet in section 2 of that Act the same legislative power was conferred upon the Parliament for the whole of Ireland constituted by that statute, expressed in almost identical language to the language of section 4 of the Act of 1920.

Reference was made to the duty on milk coming into Northern Ireland. That duty is part of a duty which applies to Northern Ireland merely as a portion of the United Kingdom. It is a temporary duty in the sense that it is not a normal duty. It was imposed along with the duty on cattle some years ago, for the purpose of meeting the payment of the Land Annuities. This duty was not designed for the special sheltering of the milk trade in Northern Ireland.

Then, it was suggested that the effect of the impugned Act would be to prevent the appellant from selling his milk in Northern Ireland. That is true so far as it relates to milk sold for human consumption, but so far as milk for manufacture is concerned, the appellant is quite as free as he was before the Act was passed.

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

Reliance was also placed on the fact that in the Milk Act there was set out a licensing system. It was said that that was a factor that was treated as of importance in the cases arising on Canadian legislation. In dealing with Canadian legislation, it may well be that the existence of a licensing system is a matter of importance. It may also be very much in point where what is called camouflaged legislation is being dealt with. With reference to this Milk Act, we submit that it is no addition to the argument on behalf of the appellant to say that this is a licensing Act. The licensing is mere machinery, a means to an end. The Parliament of Northern Ireland was attempting to ensure a pure supply of milk for the people of Northern Ireland. In order to ensure that pure supply, they were providing not merely for a standard of quality of the milk itself, but were providing that the production of the milk sold for human consumption must fulfil certain standards.

The substantial issue in the case is whether the Milk Act is a law made in respect of trade with any place outside Northern Ireland. The crux of this whole legislation lies in three words, the words "in respect of" used in section 4 (1) of the Government of Ireland Act, 1920. These three words are the apt words to indicate the true subject matter of an enactment, but they are not we submit the apt words to indicate merely the results of an enactment. They are possibly rather stronger than such a word as "concerning," and than the phrase "in relation to," but they certainly must have a different meaning, unless they be construed contrary to the general use of language, from the word "affecting." In the British North America Act the words used are "re-" lating to" and these words "in respect of" do not occur in it. We submit that these words "in respect "of" are no weaker than the words there used.

It is not contested that in ascertaining the true subject matter of an Act of a Legislature whose powers are restricted, the pith and substance of the enactment must be regarded. This test was put in *Russell v. The Queen* (1) where Sir Montague E. Smith delivering

(1) 7 A.C. 829, 839, 840.

the judgment of the Privy Council said: "The true "nature and character of the legislation in the parti- "cular instance under discussion must always be "determined, in order to ascertain the class of subject "to which it really belongs." It is correct to ascertain the true nature of an enactment of a restricted legislature by looking for the true object or purpose, if by "object or purpose" is meant the object or purpose which can be gathered from the substantive enactment, and that is collected from what is accomplished in the Statute. If it were decided at the conclusion of this case, that this Act is an Act to provide a pure milk supply, that conclusion would have been arrived at notwithstanding consideration of the fact that in one aspect the Act has resulted in affecting the trade in Northern Ireland of the appellant. That is not the substantial enactment, but is merely incidental. An incidental effect may well be a necessary and unescapable effect.

We submit that even a necessary and incidental effect does not colour necessarily the true subject matter. On this point we rely on the words of Sir Montague E. Smith in his judgment in *Russell v. The Queen* (1) where he said: "What Parliament is "dealing with in legislation of this kind is not a "matter in relation to property, and its rights, but one "relating to public order and safety. That is the "primary matter dealt with, and though incidentally "the free use of things in which men may have property "is interfered with, that incidental interference does "not alter the character of the law."

It has been contended on behalf of the appellant that although the real nature of the legislation must be looked at, when it is found that a necessary effect of the legislation is an effect such as that of which the appellant complains, then that effect colours the nature of the legislation.

Reliance for that proposition was placed on the case of *Attorney General for Manitoba v. Attorney General for Canada* (2).

(1) 7 A.C. 829, 838, 839. (2) [1929] A.C. 260.

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

Special reliance was placed on a passage in the judgment of Viscount Summer where he said: "The "matter depends upon the effect of the legislation "not upon its purpose."

We submit that when Viscount Sumner was speaking of "purpose" he meant purpose in the sense of motive. What the decision amounts to is that whatever the motive of the Provincial legislation may have been, what in fact they did, as gathered from the actual enactment was to infringe upon a subject matter which was confined exclusively to the Dominion Parliament. We submit that Viscount Sumner never intended to state that a mere incidental effect should colour the true character of the legislation.

From a passage in the judgment of Lord Sumner at the top of page 265 in *Attorney General for Manitoba v. Attorney General for Canada* (1), we submit it is clear that that decision does not support the argument on behalf of the appellant. It is clear from *Lymburn v. Mayland* (2), that *Attorney General for Manitoba v. Attorney General for Canada* (1) was never intended by the Privy Council as laying down any proposition that a necessary effect should colour the true character of the legislation.

It is not what the measure professes to do, but what it does.

It was also argued on behalf of the appellant that if you look at section 4 (1) (7) of the Government of Ireland Act 1920, the express exception prevents the implication that there may be other incidental affections of trade. It was argued that when one comes to the specific exception, No. 7, one finds grafted on to that in turn three further exceptions. The argument really was that as those three exceptions are themselves examples of incidental affecting, then the construction of the section should be such that apart from these exceptions, the words "in respect of" should be read as "affecting." In other words, because the Statute has gone to the trouble of specifying the incidental effect in three cases, one must assume that every other incidental effect which is not specified is really outside.

(1) [1929] A.C. 260, 265. (2) [1932] A.C. 318.

Assuming, which we do not admit for a moment, that the three exceptions specified are really instances of incidental effect, it is going very far to say that that must control the plain words "in respect of." It might be explained even on that assumption that they are instances of incidental effect simply by saying that the draftsman had inserted them as matters occurring to him, and they were simply put in the Act of Parliament *ex abundanti cautela.*

We submit, however, that these exceptions are not really inserted as instances of incidental effect at all. They are inserted really in an attempt to obviate the very sort of contention which has taken place in this case, a contention directed to what was the real pith and substance of an enactment which in one case is a taxing Act, in another a regulation to prevent contagious disease, and in the third an Act to set up some agency outside Northern Ireland. If we observe each of these matters carefully, we see that far from being examples of incidental effect, they indicate the sort of legislation where one might very well have said that the real substance and nature of the legislation was trade. (They were stopped).

J. M. Whitaker, K.C. (in reply):—

It has been argued on behalf of the respondent that the distinction between the present case and the Canadian cases is that in the present case it is mere machinery, suggesting that in the Canadian cases it was not. In every case of a licensing Act, the licence is merely the machinery to attain the end. In all the Canadian cases the licence was merely the machinery used, so that I submit that the propositions advanced on behalf of the appellant are not affected.

I submit that *Russell v. The Queen* (1) has been held to be a rather unusual case, and one which stands by itself. In the judgment of the Privy Council, it is stated that intoxicating liquor was regarded as a sort of poison.

The sale of intoxicating liquor is on a par in that judgment with the sale of poisonous drugs.

(1) 7 A.C. 829

H.L. 1937

THE KING (LYNN) v. GALLAGHER.

Russell v. The Queen (1) has been commented on in *Attorney General for Canada v. Attorney General for Alberta* (2). We submit that the effect of what was stated in the judgment in *Attorney General for Canada v. Attorney General for Alberta* (2) is that *Russell v. The Queen* (1) is not to be extended, and is to be viewed from its own particular aspect. We submit that the effect of *Russell v. The Queen* (1) really is that unless the facts are the same, regard must be had to other considerations.

We submit that the decision in *Lymburn v. Mayland* (3) instead of supporting the view argued on behalf of the respondent exactly supports the view that while a Parliament may be entitled to pass an Act of Parliament which will say that a foreign country can trade subject to the laws of the Province, just like any other country within the Province, or that a person outside the Province can carry on subject to the competent laws of the Province like a citizen of the Province, it cannot say " you cannot carry on at all."

Supposing that in the present case there had been the following express section in the Act : " No licence " shall be granted to any person carrying on the milk " business whose business premises are situate outside " Northern Ireland." That section cannot we submit be a section in respect of the milk trade as such, and could be challenged on the ground that it deprived the people of their rights and was in respect of trade, namely, trade with places outside Northern Ireland.

We submit that that test should be applied here.

LORD ATKIN.

LORD ATKIN : My Lords, this is an appeal by the appellant from an Order of the Court of Appeal of Northern Ireland dismissing an appeal from the Recorder of Londonderry who on appeal affirmed a conviction of the appellant by the justices for the County of the City of Londonderry for selling milk in the City of Londonderry without a licence in contravention of section 1 (1) (*c*) of the Milk and Milk Products Act (Northern Ireland), 1934. The appeal

(1) 7 A.C. 829.
(2) [1916] 1 A.C. 588.
(3) [1932] A.C. 318.

to the Court of Appeal was brought under section 50 of the Government of Ireland Act, 1920, and was brought in this House by leave of the House. The case involves a question as to the construction and validity of the Milk and Milk Products Act passed by the legislature of Northern Ireland in 1934. I need not set out verbatim the material provisions of the Act. They provide that a person shall not sell milk except under and in accordance with the Act (section 1 (1) (*c*)); that a person shall not sell milk of grade A, B or C (defined by the Act) unless he hold either a producer's or a distributors' licence (section 2 (1)); that the Ministry of Agriculture shall on application made in the prescribed manner grant to any person upon the prescribed conditions a licence and that the holder of a licence shall keep milk records and furnish such returns as the Ministry may require and permit the records to be inspected by an authorised officer (section 2 (6)). The Act further provided that an authorised officer should have power to enter and inspect at any reasonable time any part of the land or premises occupied by the holder of a licence in connection with his business, and examine milk found there and take samples (section 8 (1)). Power to make regulations is given to the Minister by section 9 (1). Regulations governing the production and sale of milk of grade C quality were made by the Minister on the 24th August, 1934 (Statutory Rules and Orders, Northern Ireland, 1934, No. 71). They provide that a producer shall permit any authorised officer at any reasonable time to inspect the herd and examine all premises and equipment used by the producer in connection with the production or sale of milk (Regulation 5), and contain other provisions as to things to be done and powers to be exercised on the premises (Regulations 6, 7, 8, 9) : and a regulation that the Minister before granting a producer's licence shall satisfy himself that the applicant's arrangements for dealing with milk, that is, arrangements for the production, handling, storage, treatment, and distribution of milk, are such as will enable him to comply with the provisions of the Act and Regulations (Regulation 22 (1) and (4)).

H.L. 1937.

THE KING (LYNN) v. GALLAGHER.

LORD ATKIN.

The appellant is one of several farmers whose farms are situate in the County of Donegal outside the territory of Northern Ireland but within a few miles of the boundary. For a considerable time before 1934 they had been in the habit of selling their milk in the City of Londonderry which appears to have been their natural market. In 1935 Mr. Alexander, a solicitor practising in Londonderry, having also a dairy farm in County Donegal, having asked for a producer's licence and being refused, applied for a mandamus to the Minister to grant him a licence. The rule was discharged by the King's Bench Division and this decision was affirmed by the Court of Appeal. The ground taken by the Minister and upheld by the Courts was that it was impossible to apply the Act to producers whose premises were outside Northern Ireland territory: and that such persons were not entitled to a licence under the Act. It was open to the appellants to dispute this decision before this House; it was but faintly argued; and seeing that the appellant was represented by Mr. Whitaker it is fairly obvious that the point did not arouse much enthusiasm. Your Lordships were all agreed that the decision of the Courts of Northern Ireland was right for the reason given; and I need say no more about it. It was also suggested before your Lordships that if this Act did not permit a farmer whose farm was outside Northern Ireland to obtain a licence it did not apply to them at all and therefore he could sell without any restrictions. I think that the Act must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory. This point also fails.

The questions as to construction of the Act are thus disposed of, and there remains the important issue as to the constitutional validity of this Act. This is attacked by reference to the terms of section 4 of the Government of Ireland Act, 1920, of which the provisions relating to Northern Ireland remain in force. "Subject to the provisions of this Act. . . the Parliament of Northern Ireland shall have power to make

laws for the peace, order, and good government of . . . Northern Ireland with the following limitations, viz., that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction, or some part thereof, and (without prejudice to that general limitation) that they shall not have power to make laws in respect of the following matters in particular, viz. . .(7). Trade with any place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said parliaments or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud": and it refers to bounties, etc. It is said that the provisions of the Milk Act interfere with, indeed, put an end to, the trade in milk between the farmers of Donegal and customers in Derry: and that therefore they offend against the express limitations imposed by section 4 (1) (7). My Lords, the short answer to this is that this Milk Act is not a law "in respect of" trade: but is a law for the peace, order and good government of Northern Ireland "in respect of" precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. These questions affecting limitation on the legislative powers of subordinate Parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the "true nature and character of the legislation" (*Russell v. The Queen* (1)); "the pith and substance of the legislation." If on the view of the statute as a whole you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are

(1) 7 A.C. 829, 839.

H.L. 1937

THE KING (LYNN) v. GALLAGHER.

LORD ATKIN.

outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislature. An Act may have a perfectly lawful object, for example, to promote the health of the inhabitants but may seek to achieve that object by invalid methods, for example, a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject. In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland: and in those circumstances though it may incidentally affect trade with County Donegal it is not passed "in respect of" trade, and is therefore not subject to attack on that ground. I am of opinion therefore that this appeal should be dismissed with costs.

LORD THANKERTON.

LORD THANKERTON: My Lords, I agree with the opinion which has just been expressed by my noble and learned friend on the Woolsack. I also concur in the motion proposed by him.

LORD MACMILLAN.

LORD MACMILLAN: My Lords, I also agree.

LORD WRIGHT.

LORD WRIGHT: My Lords, I also agree.

LORD MAUGHAM.

LORD MAUGHAM: My Lords, I concur.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that this Appeal be dismissed with costs.

The Contents have it.

Solicitors for the appellant: *Radford, Frankland & Mercer* for *Ralph S. Neilson*, and *Joseph Alexander*.

Solicitors for the respondent: *Linklaters & Paines* for the *Chief Crown Solicitor for Northern Ireland*.

J. McC.

K.B.D. 1937.

Jan. 25.

THE KING (DUNGANNON RURAL DISTRICT COUNCIL) v. THE ACTING COUNTY COURT JUDGE FOR COUNTY TYRONE (1).

Hall used for public dancing, singing, music, boxing, or other public entertainment of the like kind—Application for renewal of seven days licence—Six days licence granted by sanitary authority—"Varying"—Local Government Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 22), section 31 (1) (11).

The D. Rural District Council being the sanitary authority for the district had issued a licence enabling public dancing, singing, music, boxing, or other public entertainment of the like kind to be carried on, on seven days of the week in a Hall known as St. P.'s Hall, T., D. This licence provided that the Hall might be open when used for the purpose of public dancing on seven days of the week, and also for singing, music, and other entertainments on seven days of the week.

The licensee applied to the Rural District Council for a renewal of the licence for the year 1936, enabling public dancing to be carried on, on seven days of the week, and also for singing, music and other entertainments on seven days of the week.

The Council issued a licence under which public dancing was permitted only on week-days.

The licensee appealed to the Court County Judge under section 31 (11) of the Local Government Act (Northern Ireland), 1934.

The appeal came before the Acting County Court Judge who made an order reversing the decision of the Rural District Council and allowing public dancing on all seven days of the week with certain restrictions as to hours.

The Acting County Court Judge made up his order as a speaking order.

Subsequently an application was made on behalf of the Rural District Council to the King's Bench Division for a conditional order quashing the order of the County Court Judge on the ground that the order was made without and in excess of jurisdiction as the Rural District Council had not refused to grant or renew the licence but had in fact renewed the licence, and had imposed on the person to whom the licence was granted a condition prohibiting the use of the Hall for dancing on Sundays.

A conditional order was obtained directing cause to be shown why the order of the Acting County Court should not be quashed.

(1) In the King's Bench Division before Best, L.J., and Brown, J.

Cause having been shown against the conditional order.

Held, by the King's Bench Division (Best, L.J. and Brown, J.), that the Acting County Court Judge had jurisdiction to hear and determine the appeal as the change that took place in the hours for which the licence was granted amounted to "varying" the licence within section 31 (11) of the Local Government Act (Northern Ireland), 1934.

CERTIORARI.

Francis McCullagh, of Donaghmore, County Tyrone, was the licensee of a Hall known as St. Patrick's Hall, situate at Tullydraw, Dungannon. This Hall was used for public dancing and entertainments. In accordance with the Local Government Act (Northern Ireland), 1934, section 31 (1), the licensee applied to the Dungannon Rural District Council (being the sanitary authority for the district) for a renewal of the licence to enable public dancing to be carried on, on seven days of the week and also for singing, music, and other entertainments on seven days of the week.

The application came before the Dungannon Rural District Council who decided not to issue any licences permitting dancing on Sundays and to permit dancing only on week-days.

The Council had at a previous meeting passed a resolution that no licences would be issued by them allowing dancing on Sundays.

The licensee appealed from this decision of the Council to the County Court Judge in accordance with section 31 (11) of the Local Government Act (Northern Ireland), 1934. The appeal came before the Acting County Court Judge, who made an order reversing the decision of the Rural District Council, and allowing public dancing on all seven days of the week with certain restrictions as to hours.

By the licence granted in 1935 the Hall was licensed for the purpose of public dancing, singing, music, boxing or other public entertainment of the like kind. The premises might be used on week-days from 7-30 p.m. to 4 a.m. and on Sundays from 7-30 p.m. to 11 p.m.

The licence granted in 1936 provided that the premises might be open on week-days alone and from 7 p.m. to 4 a.m.

K.B.D. 1937.

THE KING (DUNGANNON RURAL DISTRICT COUNCIL) v. THE ACTING COUNTY COURT JUDGE FOR COUNTY TYRONE.

The order made by the Acting County Court Judge provided that a seven days licence should issue for the premises for public dancing, singing, music, and other entertainments of a like kind, the hours of opening to be restricted as follows :—On each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday, from 8 p.m. until 4 a.m. on the following morning, and on all Sundays from 8 p.m. until 11 o'clock, p.m.

The Acting County Court Judge made up his order as a speaking order.

An application was made in the King's Bench Division for a conditional order quashing the order of the Acting County Court Judge on the grounds : (*a*) that the order of the Acting County Court Judge was made without and in excess of jurisdiction, (*b*) that no appeal lay against any terms, conditions or restrictions as determined by the sanitary authority by the respective licences granted or renewed to such person as the sanitary authority thought fit to keep or use the premises for such purposes, (*c*) that an appeal lay only against a decision of the sanitary authority refusing to grant, renew, or transfer or revoking or varying a licence in respect of any premises, (*d*) that it is the premises that are licensed under section 31 of the Local Government Act (Northern Ireland), 1934, and not the person to whom the licence is granted, (*e*) that such licences are only granted or renewed to such persons as the sanitary authority think fit to keep or use premises for the purposes mentioned in section 31 (1), upon such terms and conditions and subject to such restrictions as the sanitary authority by the respective licences determine, (*f*) that these terms, conditions and restrictions as determined by these licences are imposed upon the persons to whom the licences are granted and regulate the mode of user by such persons of the licensed premises, (*g*) that the sanitary authority are the sole judges and have absolute discretion under section 31 (2) as to the terms, conditions, and restrictions upon and subject to which such authority would grant or renew licences to such persons as they think fit to keep or use premises for such purposes, (*h*) that a variation of a licence under

section 31 in respect of any premises must be some variation of the licence with respect to the premises and not a variation of a term, condition, or restriction, determined by the licence and imposed on the person to whom the licence is granted, (*i*) that the sanitary authority had not refused to grant or renew the licence in respect of these premises but had in fact renewed the licence in respect of the premises, and had thereby determined and had imposed on the person to whom the licence was granted a term, condition, or restriction prohibiting the use of the Hall for dancing on Sundays. The licence granted for the preceding year in respect of the premises had no such term, condition, or restriction determined thereby.

A conditional order was obtained by the Rural District Council directing cause to be shown as to why the order of the Acting County Court Judge should not be quashed.

Murphy, K.C., and *McCoy* for the Dungannon Rural District Council :—

The question to be decided entirely depends on the wording of section 31 of the Local Government Act (Northern Ireland), 1934.

We rely on section 31 (1).

No distinction is drawn in the Act between a six days licence and a seven days licence. Section 31 (11) contemplates an appeal in certain cases but only with regard to the premises. That sub-section was framed so as to grant only a limited right of appeal in certain events.

It cannot be said that because Sunday is left out of the licence as a day on which dancing was permitted in the premises that an appeal would lie.

The sanitary authority has not refused to grant, renew, or transfer, or revoke or vary the licence in respect of any premises.

We submit that no appeal lies against any terms, conditions, or restrictions as determined by the sanitary authority by the respective licences granted or renewed to such persons as the sanitary authority thought fit to keep or use premises for such purposes.

K.B.D. 1937.

THE KING (DUNGANNON RURAL DISTRICT COUNCIL) v. THE ACTING COUNTY COURT JUDGE FOR COUNTY TYRONE.

An appeal lies only against a decision of the sanitary authority refusing to grant, renew, or transfer, or revoking or varying a licence in respect of any premises. We rely on the words " in respect of any premises " in the sub-section. It is clear from sub-section 9 that a certain restriction in hours was contemplated by the legislature. We rely on the wording of this sub-section. We submit there has been no " varying " of the licence in respect of these premises.

We submit that the legislature contemplated what has taken place in the present case, viz., a " varying " of hours.

McGonigal, K.C., and *McSparran* for the licensee :—

The true view of the case is that there has been a refusal to renew a seven days licence. Where there has been a " varying " of the licence, there is a right of appeal. In the present case there has been a most material variation. When the hours of user of the premises are restricted, the premises are affected in a most material way.

These are personal licences granted to individuals, in connection with particular premises. An artificial meaning has been sought to be put on the words " in " respect of any premises," on behalf of the Rural District Council.

The Acting County Court Judge was entitled to hear this appeal.

BEST, L.J.

BEST, L.J. : This matter comes before us by way of certiorari.

Francis McCullagh, of Donaghmore, County Tyrone, was the licensee of a Hall known as St. Patrick's Hall, Tullydraw, Dungannon, used for public dancing and other entertainments. Public dancing could be carried on only during week-days, between certain specified hours. Singing could be carried on on Sundays between certain named hours, and music, boxing and other entertainments were respectively permitted on three specified Sundays. This licence was known as a Sunday licence. In accordance with the provisions of the Local Government Act (Northern Ireland), 1934,

section 31 (11), the licensee applied to the Dungannon Rural District Council, the sanitary authority for the district, for a renewal of the licence and for its extension so as to enable public dancing to be carried on on seven days of the week during the year 1936, and also that singing, music, and other entertainments might similarly be carried on during each day of the week. This licence is known as a seven day licence.

The application for this seven day licence came before the Dungannon Rural District Council, who decided not to issue any licences permitting dancing on Sundays, but to permit dancing only on week-days. The Council had at a previous meeting passed a resolution to the effect that no licences would be issued by them allowing dancing on Sundays.

Against this decision the licensee appealed to the County Court Judge in accordance with the provisions of section 31 (11) of the Local Government Act (Northern Ireland), 1934. The appeal came on for hearing before the Acting County Court Judge, who made an order reversing the decision of the Rural District Council and allowing public dancing on all seven days of the week with certain restrictions as to hours.

The order made by the County Court Judge directed that a seven days licence should issue, to be restricted as follows:—On week-days from 8 p.m. to 4 a.m. on the following morning and on all Sundays from 8 p.m. until 11 o'clock p.m.

Section 31 (1) of the Local Government Act (Northern Ireland), 1934, provides that "a house, room, garden "or other place (in this section referred to as "'premises'), whether licensed or not for the sale of "wine, spirits, beer or other fermented or distilled "liquors, shall not be kept or used for public dancing, "singing, music, boxing, or other public entertainment "of the like kind without a licence for the purpose or "purposes for which the premises are to be used first "obtained from the sanitary authority of the urban "or rural district in which the premises are situate."

Sub-section 11 of the same section provides that "any person aggrieved by a decision of the sanitary

K.B.D. 1937.

THE KING (DUNGANNON RURAL DISTRICT COUNCIL) v. THE ACTING COUNTY COURT JUDGE FOR COUNTY TYRONE.

BEST, L.J.

"authority refusing to grant, renew or transfer, or "revoking or varying, a licence under this section in "respect of any premises may appeal to the county "court having jurisdiction where the premises con- "cerned are situate, and the decision of that court "shall be final and conclusive."

The question is, whether the change that took place in the hours for which the licence was granted amounted to a "varying" of the licence. I am of opinion that both the premises and the individual are licensed, or perhaps it would be more accurate to say that an individual is licensed in respect of the premises. An inspection of one of the exhibited licences will make it clear that the person is called a licensee and the premises are described as the licensed premises.

I think that too strict a construction has been sought to be put on the words "in respect of any premises" in sub-section 11, section 31, of this Act, on behalf of the Rural District Council. Their submission is that a variation of a licence under that sub-section in respect of any premises must be some variation of the licence with respect to the premises themselves and not a variation of a term, condition or restriction determined by the licence and imposed on the person to whom such licence is granted.

I agree with the view taken by the learned Acting County Court Judge that the Rural District Council, having determined by their licence granted in respect of the said premises to impose the terms, conditions and restrictions which were introduced by them into the licence and which precluded the user of the said premises for Sunday dancing, had by so doing varied the licence in respect of the said premises within the meaning of the said sub-section, and that in the circumstances an appeal lay from their decision.

Having arrived at this conclusion, it follows that the cause shown must be allowed and the conditional order discharged.

BROWN, J.

BROWN, J.: I agree with the judgment of Best, L.J.

The net point was whether there had been a "varying" of the licence within section 31 (11) of the

Local Government Act (Northern Ireland), 1934. The only change that took place was a change in the hours for which the licence was granted. I think this period of hours became a part of the licence, and that there was a variation within the sub-section.

Supposing a licence had been granted limited to one hour, could it have been said that there had not been a " varying " of the licence ?

Solicitors for Dungannon Rural District Council : *John Hoy, Son & Murphy.*

Solicitor for the Licensee : *Joseph H. Donnelly.*

J. McC.

K.B.D.
1937.

March 25.

THE KING (ROBINSON DEVLIN) v. COUNTY COURT JUDGE OF FERMANAGH (1).

Practice—Execution Creditor—Garnishee—"Rateable deductions" from police constable's pay—Whether rateable deductions attachable as debt—Trust moneys—Rateable deductions different from "pensions, allowances and gratuities"—Royal Ulster Constabulary Pensions Order, 1923, *Articles* 2, 7, 17 *and* 20 (1)—*Schedule to the Pay Order*, 1922—*R.S.C. Northern Ireland, Order* 45.

By an Order made on 9th November, 1936, it was directed that R. M. should recover against R. D., the prosecutor, her costs of the order when taxed. These costs were duly taxed at the sum of £39 9*s.* 2*d.*, and the whole sum remained unsatisfied.

Subsequently a conditional order of garnishee was obtained by R. M., attaching certain moneys in the hands of the Ministry of Home Affairs payable to R. D. in respect of a refund of deductions made from his pay while serving as a member of the Royal Ulster Constabulary, towards the Constabulary Pension Fund. R. D. had been a constable in that Force but had voluntarily resigned. The moneys payable to him amounted to £151 10*s.* 10*d.*, representing "rateable deductions" from his pay made while he was a member of the Force.

Article 20 (1) of the Royal Ulster Constabulary Pensions Order, 1923, provides that "where a member of the Force, not having been "dismissed or required to retire as an alternative to dismissal, leaves "the force without a pension or gratuity, the Ministry, except where "the member leaves in such circumstances as will enable him to "reckon his approved service in the force for the purpose of pension, "shall pay him the whole of the rateable deductions which have been "made from his pay, and any bounty repaid by him under Article 14 "shall be similarly repaid."

On an application to make absolute a conditional order of garnishee, cause having been shown.

Held, by Andrews, L.J. (*a*) that the "rateable deductions" constituted a debt liquidated in its nature, although the precise amount had not been definitely ascertained when the conditional order of garnishee was obtained, and that such debt was attachable; (*b*) that such deductions were not trust moneys; (*c*) that they were essentially different from "pensions, allowances, or gratuities" which, under Article 17, could not be assigned or charged.

(1) In the King's Bench Division before Andrews, L.J.

The cause shown was therefore disallowed and the conditional order made absolute.

Motion to make absolute the conditional order of garnishee.

By an order made on 9th November, 1936, it was adjudged that one Rose Maguire should recover against Robinson Devlin, the prosecutor in the present proceedings, her costs of the order when taxed. These costs were duly taxed at the sum of £39 9*s.* 2*d.*, which remained unsatisfied. On 12th February, 1937, a conditional order of garnishee was obtained by Rose Maguire attaching the moneys in the hands of the Ministry of Home Affairs payable to the prosecutor in respect of a refund of deductions made from his pay while serving as a member of the Royal Ulster Constabulary, to the Constabulary Pension Fund.

The prosecutor had been a constable in the Royal Ulster Constabulary but had voluntarily resigned from that force. The moneys payable to him by the Ministry of Home Affairs amounted to the sum of £151 10*s.* 10*d.*, representing "rateable deductions" from his pay made while he was still a constable.

The prosecutor's right to these moneys arose under article 20 (1) of the Royal Ulster Constabulary Pensions Order, 1923, which provided under the caption of "Return of Rateable Deductions," that "where a "member of the Force, not having been dismissed or "required to retire as an alternative to dismissal, "leaves the Force without a pension or gratuity, the "Ministry, except where the member leaves in such "circumstances as will enable him to reckon his "approved service in the Force for the purpose of "pension, shall pay him the whole of the rateable "deductions which have been made from his pay, and "any bounty repaid by him under Article 14 shall be "similarly repaid."

Nicholson, in support of the motion :—

It is not necessary that the debt should be of ascertained amount, *Daniel v. McCarthy* (1).

(1) 7 I.C.L.R. 261.

K.B.D. 1937.

THE KING (ROBINSON DEVLIN) v. COUNTY COURT JUDGE OF FERMANAGH.

Pensions, allowances and gratuities are referred to in Article 7 of the Royal Ulster Constabulary Pensions Order, 1923, and the scale thereof and provisions relating thereto are contained in the first schedule to that Order.

This first schedule does not and cannot relate to "rateable deductions" which are first referred to by Article 20 of that Order. The re-payment of "rateable deductions" by the Ministry is mandatory under that Article and is a "debt" within the meaning of Order 45 of the Rules of the Supreme Court.

McCoy for the prosecutor :—

There was no debt for which the prosecutor could sue the Ministry of Home Affairs, as the amount had not been computed.

These "rateable deductions" were trust moneys, as if the prosecutor had been dismissed from the Police Force he would not have been entitled to them as of right. These "rateable deductions" payable under Article 20 fall also within the provisions of Article 17 which relates to "pensions, allowances, and gratuities" and which declares that except as therein provided, every assignment and charge thereof shall be void.

ANDREWS, L.J.

ANDREWS, L.J. : This matter came before me on an application to make absolute a conditional order of garnishee.

By an Order made in this matter on 9th November, 1936, it was ordered that one Rose Maguire should recover against Robinson Devlin, the prosecutor in the title hereof mentioned, her costs of said Order when taxed. The said costs were duly taxed on 15th December, 1936, at the sum of £39 9*s.* 2*d.*, of which the sum of £36 9*s.* 2*d.* remains unsatisfied.

On 12th February, 1937, a conditional order of garnishee was obtained at the instance of Rose Maguire attaching the moneys in the hands of the Ministry of Home Affairs payable to the said Robinson Devlin in respect of a refund of deductions made from his pay while serving as a member of the Royal Ulster Constabulary towards the Constabulary Pension Fund.

Robinson Devlin was a constable in the Royal Ulster Constabulary, from which force he voluntarily resigned. The moneys payable to him by the Ministry amount to the sum of £151 10*s.* 10*d.*, representing "rateable "deductions" from his pay made whilst he was a member of the Force. Devlin's right to these moneys arises under Article 20 (1) of the Royal Ulster Constabulary Pensions Order, 1923, which provides, under the caption of "Return of Rateable Deductions," that "where a member of the Force, not having been dis- "missed or required to retire as an alternative to "dismissal, leaves the Force without a pension or "gratuity, the Ministry, except where the member "leaves in such circumstances as will enable him to "reckon his approved service in the Force for the "purpose of pension, shall pay him the whole of the "rateable deductions which have been made from his "pay, and any bounty repaid by him under Article 14 "shall be similarly repaid."

The application was resisted by Mr. McCoy, who appeared on behalf of Robinson Devlin, on several grounds.

In the first place he submitted that there was no "debt" for which Devlin could sue the Ministry, as the amount had not been computed. Mr. Lawrenson, who represented the Ministry of Home Affairs, has satisfied me by his evidence that the amount was definitely ascertained on 15th February last pursuant to a report of the Inspector General, of 11th February. It was a perfectly simple calculation, being merely the aggregate of deductions made during service less the sum of £3 18*s.* 4*d.* for Income Tax. It was therefore in my opinion clearly a debt, liquidated in its nature, though its precise amount had not been definitely ascertained on 12th February when the conditional order of garnishee was obtained. As such it clearly falls within the principle of such cases as *Daniel v. McCarthy* (1), and *O'Driscoll v. Manchester Insurance Committee* (2), as not a mere claim but a debt which may be attached. At most it might be said that it was not presently payable when the garnishee order

(1) 7 I.C.L.R. 261. (2) [1915] 3 K.B. 499.

K.B.D. 1937.

THE KING (ROBINSON DEVLIN) v. COUNTY COURT JUDGE OF FERMANAGH.

ANDREWS, L.J.

was obtained, owing to the fact that the amount had not then been ascertained, but it was none the less a debt to which Devlin was absolutely and not contingently entitled.

Secondly, Mr. McCoy contended that these were "trust moneys," because if Devlin had been dismissed from the force he would not have been entitled to them as of right. This argument points merely to a claim which in different events the Ministry, not a third party, might have had upon the moneys. In the events which have happened they neither have nor have they made any such claim.

Finally, Mr. McCoy contended that these "rateable "deductions" payable under Article 20 fall also within the provisions of Article 17 which relates to "pensions, "allowances and gratuities" and which declares that, except as therein provided, every assignment and charge thereof shall be void. It has been held in such cases as *Birch v. Birch* (1), and *Lucas v. Harris* (2), that a pension cannot be attached if the pensioner cannot assign it; but the simple answer to this line of argument is that "rateable deductions" are something essentially different from "pensions, allowances or gratuities." This appears clearly from the terms of Article 20, which applies to a member of the force who "leaves "the force without a pension or gratuity," and also from the terms of Article 7 and of the First Schedule to the Order fixing scales of pensions, allowances and gratuities, which do not relate to rateable deductions. Further, it will be observed that a payment under Article 20 does not require the consent of the Ministry of Finance, whilst such consent is prescribed as requisite in the case of pensions, allowances and gratuities. In short, "rateable deductions," as defined in Article 2 of the Order of 1923 and in Article 12 of the Schedule to the Pay Order, 1922, are essentially different in their origin, character and conditions of payment from "pensions, allowances and gratuities," and Article 17 has, in my clear opinion, no application whatever to them.

(1) 8 P.D. 163. (2) 18 Q.B. 127.

The cause shown must accordingly be disallowed, and the conditional order of garnishee made absolute with costs.

Solicitors for the applicant : *Maguire & Herbert.*
Solicitors for the prosecutor : *Henry Murphy & Son.*

J. McC.

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT (1).

June 23, 25, 30. July 2, 19.

C.A. 1937.

July 29, 30, 31.

Infant—Custody—Habeas Corpus—Respective Rights of Father and Mother—Welfare of child chief consideration—Decree of divorce in United States of America—Whether such decree valid in Northern Ireland—Severability of order of Foreign Court—Comity of Courts.

The applicant was the mother of an infant whose custody was the subject matter of an application to make absolute a conditional order of *habeas corpus ad subjiciendum*. She had been married in 1931 in the United States of America. Her husband was a British subject, but she was previous to her marriage a United States subject. Her husband had resided at various times in the United States of America and in England, but had always remained a British subject, and his domicile of origin was unchanged.

The applicant stated that her husband had alleged that their marriage was not legal and that she then insisted that they should be re-married, and that this re-marriage took place on October 3rd, 1931.

A son, the infant in the present proceedings, was born on April 30th, 1932.

The applicant further stated that in or about the month of June, 1932, she went to New York City, and that she was still there in November, 1933, when her husband kidnapped the child from her custody and absconded with it to Northern Ireland.

In May, 1934, the child was brought back to the City of New York, and was taken to the home which the husband had provided for himself, his wife and child.

The applicant obtained a decree of divorce in the State of Florida, on 12th July, 1934, and also a decree that she should have the sole custody of the child. The husband alleged that he was never served with any document in these divorce proceedings.

The child was removed by his father from the applicant's custody on October 20th, 1934. The father alleged that he removed him because he was living under immoral conditions and in immoral surroundings. The father brought the child to Northern Ireland, and he had since remained in that jurisdiction. No steps were taken by the applicant until June, 1936, to recover the custody of the child. She came to Northern Ireland, called at the house of the paternal grandmother of the child, where the child was living and had been well cared for. She demanded that he should be handed over to her, but her demand was refused.

(1) In the King's Bench Division before Best, L.J., and in the Court of Appeal before Andrews, L.J., and Brown, J.

Subsequently the applicant obtained a conditional order of *habeas corpus*, and also an order prohibiting the removal of the child out of the jurisdiction of the Court. On the date when cause was to be shown against the conditional order, the child was produced in Court, and an application was made on behalf of the father for an extension of time showing cause. The hearing was adjourned and the child was given into the custody of the applicant on her undertaking that she would produce the child at the adjourned hearing.

On the day fixed for the adjourned hearing, Best., L.J., sat to hear the application, and the applicant not having appeared, a peremptory order was made that she appear in Court and produce the body of the child, and that, in default of her doing so, a writ of attachment should issue for her arrest and committal.

The applicant had left Northern Ireland with her child and had been traced to Liverpool. She was arrested and brought back within the jurisdiction and she subsequently appeared in Court in custody. The child was also brought back to Northern Ireland.

Best, L.J., then ordered her to be confined in prison for the breach of her undertaking and to be kept there until further order.

Held, by Best, L.J., that he was not compelled by the principle of comity of courts to sever the decree made by the Court in Florida and to give effect only to the part favourable to the applicant while ignoring the part which would be unfavourable to her, in other words to sever that portion of the order relating to the divorce from the other portion granting custody of the child to the applicant.

Held further, by Best, L.J., that the welfare of the child being the paramount consideration, that such welfare would be best secured by allowing the child to remain with the consent of his father in the custody of his paternal grandmother and her daughter, who had been keeping the child for nearly three years and caring for him on behalf of the father.

Held, by the Court of Appeal (Andrews, L.J., and Brown, J.), affirming Best, L.J., that the decree of divorce *a vinculo* is not valid or legally binding in Northern Ireland, so that the child's parents were still husband and wife in law, and that the decree of divorce *a vinculo* could not be treated as a decree of divorce *a mensa et thoro*.

Held further, affirming Best L.J., that the Courts were not obliged out of regard to the principle of comity of Courts to sever the decree and give legal effect to that portion which related to the custody of the child.

A decree of divorce made in a foreign country without regard to domicile may according to the law of that country be valid within the limits of that country; but to a divorce so pronounced the Courts of Northern Ireland deny validity within their jurisdiction.

At common law the father as the natural head of the family enjoyed rights regarding the custody of his children which were superior to those of the mother, however young her child might be. The rigour of the law was modified by statute, and the right of the parents are now governed by the provisions of section 5 of the Guardianship of Infants Act, 1886, which declares that the Court is to

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

have regard to, (*a*) the welfare of the infant ; (*b*) the conduct of the parents ; and (*c*) the wishes as well of the mother as of the father.

Held also (reversing Best, L.J.), that, the welfare of the infant being the principal consideration, the mother's claims to the custody of their child were superior.

In re O'Hara [1900] 2 I.R. 232, applied.

The conditional order of *habeas corpus* was therefore made absolute, and the Court directed that the child should be handed over in Court to the custody of the applicant.

APPLICATION to make absolute a conditional order of *habeas corpus ad subjiciendum.*

The applicant was the mother of the infant whose custody was the subject matter of an application to make absolute a conditional order of *habeas corpus ad subjiciendum.* This conditional order was directed to the father and the paternal grandmother of the child prohibiting its removal out of the jurisdiction of the Court. The applicant asked to have this order made absolute notwithstanding cause shown.

The facts are fully set out in the judgments.

J. D. Chambers for the applicant.

Beattie, K.C., and *Copeland* for the respondents.

Cur. adv. vult.

BEST, L.J. BEST, L.J. : The question for decision in this case is whether the custody and care of the infant should be given to the infant's father or to his mother.

The facts are somewhat complicated but I shall try to state them as succinctly as possible and to arrive at the conclusion to which, in my opinion, they ought to lead. The father of the child is Edmund Arthur Lyons, at present residing at 5, Eglantine Place, in this City, in which he was born. He has resided at various times in the United States of America and in England, but Mr. Chambers frankly admits that he is still a British subject and that his domicile of origin is unchanged.

The mother of the child, Mary E. B. Lyons, whom for shortness I shall call Evelyn Lyons, appears to have been born in Florida, U.S.A.

According to a Bill of Complaint filed by her in the Circuit Court in and for Hillsborough County, State of

Florida, in Chancery, she and the said Edmund Arthur Lyons were married to each other at Passaic, New Jersey, on June 12th, 1931.

Thereafter and until approximately October 3rd, 1931, the parties lived together and cohabited as man and wife. She became pregnant on or about August 1st, 1931, and so informed her husband. She alleges that he thereupon began to abuse her, that he made suggestions about having an illegal operation performed, and averred that the marriage on 12th June, 1931, was not a legal marriage, and she further alleges that he was guilty of many acts of cruelty. She says that this state of affairs continued until October 1st, 1931, when she insisted that she and her husband should be re-married in the City of New York.

The said Evelyn Lyons further avers that she procured a licence at the City Hall, City of New York, State of New York, and that she was remarried to the said Edmund Arthur Lyons on October 3rd, 1931.

In the Bill of Complaint it is further alleged that she was ordered by her husband to leave the State of New York, that she immediately returned to Tampa, Florida, and has resided there ever since, *i.e.*, up to the 1st of June, 1934, the date when she verified her Bill of Complaint before a Notary Public. She further says that a son, Edmund Lyons, the infant in the present proceedings, was born in Tampa, Florida, on April 30th, 1932, and that in or about the month of June, 1933, she went to New York City and to other places which are mentioned, for the purpose of visiting relatives at those places.

She says that whilst visiting in New York City in or about the month of November, 1933, her husband Arthur Lyons kidnapped the child from her custody and absconded with him to Ireland.

Here I may observe that the parties were still husband and wife, and it is scarcely an appropriate use of words to say that the father of a child who was bringing the child on a visit to his native country had kidnapped him from its mother. The child was brought back to the City of New York on or about May 21st, 1934, by Alice Lyons, a sister of the said Edmund Arthur Lyons, and

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

BEST, L.J.

was taken by her to 1785, Riverside Drive, New York, the home which the said Edmund Arthur Lyons had provided for himself, his wife and his child.

Alice Lyons called the following morning to keep an appointment with her sister-in-law, the said Evelyn Lyons, when it was discovered that the home was broken up, that the child and his mother had disappeared, and Miss Lyons, having waited for about three weeks and having been unable to discover the whereabouts of either mother or child, left New York for Belfast on June 11th, 1934.

A final decree based on the allegations contained in the Bill of Complaint already referred to was pronounced on the 12th day of July, 1934, in the Circuit Court of the thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, in Chancery. After reciting as therein, the findings of the Court are stated to be :—

1. That the Court has jurisdiction of the parties and of the subject matter in this cause.

2. That the allegations of the Bill of Complaint herein above have been proven as charged, and that the equities in this case are with the plaintiff.

3. That the plaintiff is entitled to the relief prayed for in the Bill of Complaint filed herein.

It is therefore Ordered, Adjudged and Decreed after due consideration of the matters mentioned therein that Evelyn Lyons the plaintiff be and she is hereby granted a decree of absolute divorce from the said defendant Arthur Lyons.

It is further Ordered, Adjudged and Decreed that the plaintiff Evelyn Lyons shall have the sole and exclusive custody and control of the minor child of the plaintiff and defendant, to wit, Edmund Erle Lyons.

The decree is dated 12th July, 1934, is signed by the Judge, and has a certificate attached to it signed by the Clerk to the Circuit Court, certifying that the above and foregoing final decree is a true and correct copy of the original on the file in his office. The date of the certificate is July 12th, 1934, and the Seal of the Circuit Court, Hillsborough County, Florida, is impressed upon the certificate.

Mr. Chambers says that this order gives the sole custody of the child to his client and that what he calls the comity of Courts requires that until the order is reversed or modified by the Court which made it, his client is not to be deprived of the right to the custody of the child. He fully admits that, whatever be the effect of the decree in the United States of America, it does not dissolve the marriage according to the law of this country; his words on the point were: "that so "far as the divorce is concerned I cannot say that it is "a divorce *a vinculo*."

It is necessary now to refer as briefly as possible to the further developments in this unhappy dispute.

It appears from the affidavit of Edmund Arthur Lyons sworn on 28th June last that on or about July 18th, 1934, Evelyn Lyons returned to New York and informed him that she had obtained a divorce in Florida. He says he was never served with any documents in the proceedings, and this statement appears to be borne out by the terms of the final decree itself.

He then instituted proceedings in the New York Court to have the order of the Court in Florida set aside and the said Evelyn Lyons appears to have been served with notice of this application, but I am informed that the New York Court decided that it had no power to interfere with the order of the Florida Court even if improperly granted.

The child was taken charge of by his father on October 20th, 1934, as he says he was living in immoral conditions and surroundings which are described in his said affidavit sworn in this matter on June 28th.

Before removing the child he consulted the British Consul in New York and was satisfied that if he had the child removed to Northern Ireland no American Court could compel him to return the child to such horrible surroundings, particularly as he would be removing the child from within the jurisdiction of the New York Court and not from that of the Florida Court.

The father further says that he gave up a lucrative appointment with the firm of Robert McBratney &

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

BEST, L.J.

Company (Incorporated) of New York and Belfast in order that he might be able to remove the child from the conditions under which he was being maintained, and he further says, to use the expression in his affidavit, that his wife was aware of the boat on which he and the child sailed from New York within one day of their departure.

Father and son arrived in Belfast at the beginning of November, 1934, and the father says that he immediately wrote to the said Evelyn Lyons and did not conceal his address but told her that the child and he were living with his mother at 5, Eglantine Place, Belfast, and that both of them were being well looked after.

He further says that from that time onwards until the present he has been in correspondence with his wife, that he has written to her seven or eight times each year, and that she on most occasions replied to his letters. It is a pity that none of the letters alleged to have been written by either of the parties has been exhibited to enable one to judge as to their meaning and to understand the relationship in which the parties really stood to each other during the period in question.

The child has in fact remained within the jurisdiction of this Court since its arrival in Belfast in November, 1934, with the exception of a short time when he appears to have been in London for the Coronation.

The mother says that it was by reason of ill-health and because of want of means that she did not take steps until last month to recover the custody of the child.

She attended the residence of Mrs. Louisa Lyons, the paternal grandmother of the child, at 5, Eglantine Place, Belfast, on June 22nd last, and demanded that possession of the child should be given to her, which was refused.

She was informed that her husband was in London and she says that on June 23rd she received a telephonic communication from him that in response to a telegram from his mother he had returned to Belfast and would do his utmost to prevent the child being given into her custody.

It was apprehended that the said Edmund Arthur Lyons might attempt to remove the child from the jurisdiction of this Court, and accordingly an application by Mr. Chambers was made to me on that day on behalf of the said Evelyn Lyons that an order of *habeas corpus ad subjiciendum* should be directed to Mrs. Louisa Lyons and to Edmund Arthur Lyons and that an order might be made prohibiting the removal of the child out of the jurisdiction of this Court. A conditional order was thereupon granted, cause to be shown by eleven o'clock a.m. on Friday, June the 25th.

On that date the child was produced in Court and Mr. Copeland, on behalf of the father, applied for an extension of time for showing cause. I adjourned the hearing of the cause until Wednesday, June the 30th, at 10-30 a.m., and I gave the child into the custody of the mother on her undertaking given in open Court that she would produce the body of the child at the hearing on June the 30th.

On this date I sat in Court to hear the cause, and the said Evelyn Lyons not having appeared and upon being called not having answered, I made a peremptory order that she do attend in person and produce the body of the said infant on Friday, the 2nd day of July, at 10-30 a.m., and that in default of her so doing a writ of attachment do thereupon forthwith issue for the arrest of the said Evelyn Lyons and for her committal to the custody of the Governor of His Majesty's Prison, Armagh, there to be detained and kept in safe custody until further order.

Later it was brought to my notice that the said Evelyn Lyons had left Northern Ireland with the child and had been traced to Liverpool. Steps were immediately taken to have her arrested and brought back within the jurisdiction, and on Friday, July 2nd, she appeared in Court in custody; the child also was brought to Belfast and was kept safely within the precincts of the Court.

I ordered the said Evelyn Lyons to be confined in Armagh Prison for the breach of her undertaking and to be kept there until further order.

I then in her presence heard Counsel for each of the

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

BEST, L.J.

parties, Mr. Chambers for Mrs. Lyons, and Mr. Beattie, K.C., with whom was Mr. Copeland, for the husband.

As already stated, the argument advanced by Mr. Chambers is that the order of 12th July, 1934, made by the Florida Court gives the sole custody of the child to his client, and that comity requires that until that order is reversed or modified or qualified in some way by the Court which made it, his client is not to be deprived of the right to the custody of the child. The Florida Court by its order purported to dissolve the marriage. In doing so it does not appear to have considered the question of the domicile of the spouses. I am not saying this by way of criticism but merely to show that the part of the order dissolving the marriage has no effect whatsoever in this country.

That was laid down in *Le Mesurier v. Le Mesurier* (1), where Lord Watson says that, "according to inter-"national law, the domicile for the time being of the "married pair affords the only true test of jurisdiction "to dissolve their marriage."

Mr. Chambers concedes that the order of the Court in Florida as to the dissolution of the marriage tie has no legal effect in this country; he concedes in fact that this Court cannot recognize that part of the order as having any more scope than a divorce *a mensa et thoro* possesses, even if the validity of the decree of the Florida Court be admitted, and even if I am bound by comity to give effect to that decree in this country. I am asked by Mr. Chambers to enforce it so far as it is good according to the law here, and to do so on what he has called again and again the principle of comity, which, as I understand it, means as regards this case that effect should be given in our Courts to rights acquired by the parties in the Courts of the United States of America.

But I have now before me two persons who, according to the law of this country, are man and wife, the matrimonial bond being still in existence here.

Am I compelled out of regard to comity to sever the decree and to give effect only to that part which is favourable to the wife whilst ignoring the part which

(1) [1895] A.C. 517, 540.

in this country is unfavourable to her? I do not think, in the circumstances of this case, that comity requires me to do any such thing, and I will leave it to the Court of Appeal or, in the last resort, to the House of Lords to decide whether I am right or wrong in taking up this position.

But this does not conclude the matter. There are here present a British subject, the father of this child, his wife (for such she still is in this country) who has invoked the aid of this Court and who therefore must abide by its decision until overruled or varied, and above all I have within the jurisdiction of the Court and under its control an infant boy born on April 30th, 1932, the son of a British subject who has not, in my opinion, lost his status as such subject. That father has had control of the child since November, 1934, when he was brought to Belfast and placed by him with his own mother, the child's grandmother, and since that time the child has been most carefully looked after and provided for and is happy in his surroundings so far as one can judge.

No authority has been cited to show that the child is other than a British subject, and in the absence of such authority I must and do hold that such is his status.

The welfare of the child is what must be looked to, it is the paramount consideration, and I am satisfied from reading the numerous affidavits sworn and filed in this matter that his welfare will be best provided for by allowing him to remain, with the consent of his father, in the custody of his paternal grandmother and her daughter, Miss Alice Lyons, who for now nearly three years have been keeping the child and caring for him on his behalf.

As this is a case in which an appeal might reasonably and very possibly may be taken, I will put the father of the child, its grandmother, Mrs. Louisa Lyons, and its aunt, Miss Alice Lyons, under terms that the child will not be removed from the jurisdiction of the Court until the time for serving notice of appeal against this order shall have expired, and if before the expiration of that time such notice shall have been served, that

K.B.D. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

BEST, L.J.

the child will not be removed out of the jurisdiction until the appeal has been disposed of.

Each of the ladies in the affidavits sworn by them has offered to abide by any undertaking which the Court may require.

I make no order as to costs.

The applicant appealed to the Court of Appeal.(1)

E. S. Murphy, K.C., and *J. D. Chambers* for the appellant :—

The outstanding factor in the case is that although there are highly controversial matters in the affidavits, there is no suggestion that the mother in coming from America to seek to recover the custody of her child was not actuated by what was the purest motive that could actuate any human being, the love of a mother for her child.

One of the questions to be decided would be : did domicile determine the jurisdiction to deal with the custody of an infant child ? We submit confidently that domicile does not determine that jurisdiction. We rely on *Stathatos v. Stathatos* (2), and on *De Montaigu v. De Montaigu* (3).

We also rely on *Armytage v. Armytage* (4).

A decree for divorce *a vinculo* entirely dissolves the marriage. There is a decree of a competent Court at least amounting to a decree for judicial separation. We ask this Court to recognize this decree of an American Court. The common law of England is still the common law of the United States. It is inherent in this decree of the American Court that the parties are judicially separated. The Courts of the United States have clearly jurisdiction to determine this question of the custody of the child, and such jurisdiction depends on residence and not on domicile.

We submit that the law on this point is correctly stated in *Dicey's Conflict of Laws* (4th ed.), p. 524, in these words : " The authority of a parent as regards

(1) In the Court of Appeal before Andrews, L.J., and Brown. J.

(2) [1913] P. 46.
(3) [1913] P. 154.
(4) [1898] P. 178.

"the person of his child while in England is not "affected by the nationality or the domicile of the "parties, but is governed wholly by the law of "England."

We submit that the principle of the comity of Courts should be applied to the present case. The Courts in this country would be very slow to say that the whole of this decree of the Court in Florida is a nullity.

The trend of authority in the case of a very young child is in favour of the view that subject to the consideration of the welfare of the child, more weight should be given to the mother's affection.

The husband by his own application, whatever the nature of the application to the Court in New York, had adopted the jurisdiction of the Courts of the United States, having done that, the Court should not encourage him to get an order for the custody of the child which he had failed to get in the United States.

On this point we rely on the principle set forth in *Dicey's Conflict of Laws* (4th ed.), p. 36, as correctly stating the law. It is in these words : "The Courts of "any country have a right to exercise jurisdiction over "any person who voluntarily submits to their juris-"diction, or in other words, the Courts of a country "are Courts of competent jurisdiction over any person "who voluntarily submits to their jurisdiction."

This Court has ample jurisdiction to review the discretion exercised by Best, L.J.

We rely on *In re Ward, Infants* (1), where it was held by the House of Lords that if a sufficient case is made for going contrary to the father's wishes, the Courts have no hesitation in doing so.

We also rely on *In re O'Hara* (2). In that case Holmes, L.J., said : "No doubt, the period during "which a child has been in the care of the stranger is "always an important element in considering what is "best for the child's welfare. If a boy has been "brought up from infancy by a person who has won "his love and confidence, who is training him to earn "his livelihood, and separation from whom would "break up all the associations of his life, no court

(1) [1924] 2 I.R. 122. (2) [1900] 2 I.R. 232, 253.

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

"ought to sanction in his case a change of custody. "But I never heard of this principle being acted on "where a boy or girl under the age of eleven has spent "less than two years with the person who resists the "parent's application. It is one of the advantages of "of youth that it can adapt itself to altered circum- "stances with a facility which disappears with ad- "vancing years."

The child has been in the custody of the father wrongfully. We submit that this little boy should not be separated from his mother.

The attempts which have been made to discredit the applicant are strong evidence against the husband. He has attempted to bastardise this child by denying the first marriage.

The present case is much stronger for the applicant than was *In re A. and B.* (*Infants*) (1), where it was held that the Court will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct.

We also rely on *B. v. B.* (2), where it was held that the Court will always bear in mind that the benefit and interest of the infant is the paramount consideration.

We submit that this Court exercising its discretion should decide that the applicant is entitled to the custody of her child.

[They also referred to *In re Thain* (3); *In re J. M. Carroll* (*an Infant*) (4); *In re W., W. v. M.* (5); *Mart v. Mart* (6); *The Poulett Peerage* (7).]

Beattie, K.C., and *Copeland* for the respondent :—

The father is entitled to the custody of his child at common law. *Prima facie*, the husband would be entitled to custody, and therefore the question arose how did the applicant propose to displace him from that position at common law ? She threw down the order

(1) [1897] 1 Ch. 786.
(2) [1924] P. 176.
(3) [1926] 1 Ch. 676.
(4) [1931] 1 K.B. 317.
(5) [1907] 2 Ch. 557.
(6) [1926] P. 24.
(7) [1903] A.C. 395.

of a foreign Court and said that that Court had decreed that she was entitled to the custody of the child and thereby displaced the father. She relies on the order of a foreign Court. Our answer on behalf of the father is that the order made by the Court in Florida has no force or effect in Northern Ireland. The order of the Court in Florida could have no effect for the reason that the Court which granted that order had no jurisdiction by reason of the fact that the husband's domicile was in Northern Ireland.

We submit that the law on this subject is correctly stated in *Halsbury* (*Hailsham edition*), Vol. 6, page 304, in these words : " The English Courts do not recognize " as possessing extra-territorial validity any decree of " divorce pronounced by the Courts of a foreign " country (including for this purpose those of Scotland " and Northern Ireland), unless at the date of the suit " the parties were domiciled within the jurisdiction " of the Court pronouncing it. . . . As the English " Courts themselves claim no jurisdiction to dissolve " the marriage of persons not domiciled in this country, " so also they refuse to admit that anything short of " domicile can give the foreign Court jurisdiction to " decree a divorce which will be valid in England and " will carry with it the necessary legal consequences " in this country."

We rely on *Le Mesurier v. Le Mesurier* (1), where it was held that the permanent domicile of the spouses within the territory is necessary to give its Courts jurisdiction so to divorce *a vinculo* that its decree to that effect shall by the general law of nations possess extra-territorial authority.

We also rely on *Bater v. Bater* (2), where it was held that the domicile for the time being of the married pair, when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage.

We rely on the words used by Viscount Haldane in *Lord Advocate v. Jaffrey* (3), where he said : " Since " *Le Mesurier v. Le Mesurier* (4) was decided in terms " that gave effect to the spirit as well as to the letter

(1) [1895] A.C. 517.
(2) [1906] P. 209.
(3) [1921] 1 A.C. 146, 152.
(4) [1895] A.C. 517, 526.

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

" of this principle it has been clear that nothing short " of a full juridical domicile within its jurisdiction can " justify a British Court in pronouncing a decree of " divorce, and that the old notion is now absolute, " that there can be, short of such a full domicile, a " so-called ' matrimonial domicile ' which can give the " same result."

We rely upon *H. v. H.* (1), where it was held that the competent jurisdiction to dissolve a marriage is that of the husband's domicile, and the defendant must be domiciled in that jurisdiction at the commencement of proceedings. Independent authority to dissolve the marriage cannot exist in two sovereign states simultaneously.

We also rely on the words used by the President of the Probate Division in *Keyes v. Keyes and Gray* (2), where he said : " Apart from any express statutory provision " which may exist, the jurisdiction to decree dissolution " of marriage depends according to English law upon " the domicile of the parties."

It was held in *Herd v. Herd* (3), that since the decision of the House of Lords in *Lord Advocate v. Jaffrey* (4) and of the Privy Council in *Attorney-General for Alberta v. Cook* (5), that there can only be a single matrimonial domicile of the husband and wife in which proceedings can be maintained to dissolve the married status, no exception to that general rule can be admitted in the case of a wife deserted by her husband in the original matrimonial domicile. Under such circumstances the wife cannot be allowed to assert for the purpose of maintaining proceedings that the original domicile of the husband is still subsisting and that the English Court retains jurisdiction to dissolve the marriage when the husband has acquired a domicile of choice elsewhere.

At common law the father has the right to the custody of the child. We are not denying that in certain circumstances he could be displaced.

[BROWN, J. : The father has no priority over the

(1) [1928] P. 206.
(2) [1921] P. 204, 214.
(3) [1936] P. 205.
(4) [1921] 1 A.C. 146.
(5) [1926] A.C. 444.

mother at the present time. If a father and a mother come before the Court in a dispute about a child the Court has to decide on equitable grounds which was to have custody of the child.]

The father has the right to the child in certain circumstances even against the mother.

It is stated in *Halsbury* (*Hailsham ed.*), Vol. 17, page 660, that : " subject to the first and paramount " consideration of the infant's welfare, a father has a " natural jurisdiction over, and a right to the custody " of, his child during infancy, except that in the case of " a daughter the right determines on her marriage " under age. The right exists even against the " mother, and in the case of a ward of court, except " where the father forfeits it by his own act or " conduct."

[BROWN, J. : Does it not come to this : As the law stands, it is the welfare of the child that matters ?]

That is our case. That was our argument before Best, L.J.

[BROWN, J. : Have not the Courts at various times held that for a very young child the predominant factor is that the child should be kept in its mother's care ?]

In proper circumstances.

[BROWN, J. : I will put an absurd case. Take a child of four months. The father takes the child away, and the mother brings proceedings. Would not the Court decide to leave the child in the mother's care. Where do you say that that principle is dropped ? At what age is that principle dropped ?]

It is not a question of age it depends upon the facts of the particular case.

[BROWN, J. : In considering the welfare of the child is age to be taken into account ?

Of course.

[BROWN, J. : At what age does the primary consideration cease ?]

No one could say.

[BROWN, J. : Would you say that when a child reaches five years that it could safely be taken from the mother ?]

Yes.

C A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

[BROWN, J. : When was the boundary passed ? At five years ?]

We do not say that.

The Court's duty is to act for the benefit of the child. It is the welfare of the child that must be looked at. Every case must depend on its own circumstances.

The mother of the child having appealed to this Court is bound by the decision of the Court. The interests of the child are paramount.

It has been contended on behalf of the appellant that the decree of the Court in Florida can be split up. In other words that the greater includes the less.

We submit confidently that this decree of divorce *a vinculo* cannot be treated as if it were a decree of divorce *a mensa et thoro.*

The appellant must stand or fall by the decree of the Florida Court.

The decree cannot be severed and effect cannot be given to that part of the decree which relates to the custody of the child. The direction for custody was merely ancillary to the decree for divorce.

The cases that have been referred to on behalf of the appellant are not similar and have no application to the present case.

The fact that this appellant has broken her word on two occasions, first to her husband and afterwards to Lord Justice Best has to be borne in mind.

We submit that the law is correctly stated in *Simpson on The Law of Infants* (third ed.) in these words : " This right of the father, except as limited by " statute, whether he keep the children under his own " control, or place them with a third person is an " absolute one even against the mother, though " the child be an infant at the breast. *Ex Parte McClellan* (1)." There can be such a thing as the father having custody although other persons are taking charge of the child. In *In re Thomas* (2), a case where two infants had been sent to England by their father, who was resident in India, the Court appointed a guardian of the children, to act for the

(1) 1 Dowl. 81. (2) 22 L.J. (Ch.) 1075.

father during his absence abroad, notwithstanding that their mother was residing in this country.

It has always been recognised that the father can have legal custody although he hands over the child to other persons for care and education.

The child has been well cared for while under his father's custody, in the grandmother's home.

We submit that the appellant had disentitled herself from having the care of the child.

Murphy, K.C. (in reply):—

The law governing the custody of the child is the law of the country where the child is.

The husband's statement that his wife broke her compact is most actively in controversy.

The most dominant feature of the case is the intense desire of the applicant to recover her child.

In *In re A. v. B. Infants* (1), the mother's rights are treated as actually superior to those of the father.

The appellant was compelled to allow the child to remain in Northern Ireland because of illness and want of knowledge of the child's whereabouts. When she learned where the child was, she was prevented by illness and want of means from taking proceedings.

The outstanding statement in the affidavits which has never been contradicted is that of the appellant in which she said that her only interest in life is this child.

This is the case of a child of five years who is entitled to all his mother's love. A grandmother's love cannot take the place of a mother's love. Nothing can make up to the boy for the loss of his mother's love. To an infant child the mother's love is definitely more important than the father's love. In the present case the mother had demonstrated her intense desire to get the child for herself.

In considering the welfare of this child this love of the mother must be taken into account.

Cur. adv. vult.

(1) [1897] 1 Ch. 786.

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

ANDREWS, L.J.

July 31.

ANDREWS, L.J., delivered the judgment of the Court which was as follows :—

The facts of this case are set out in affidavits which Mr. Murphy rightly characterised as of a most highly controversial character. In the grave conflict of testimony which exists he contended that there was one outstanding uncontradicted fact, namely, that the mother's love for her child was her sole motive in seeking to recover his custody. We have no doubt that Mr. Murphy claims for his client nothing more than he is justified in doing ; but we wish it to be clearly understood in fairness to the child's father that we approach the consideration of the case in this judgment from the standpoint that, in opposing these proceedings brought by his wife for the custody of their only child, he likewise is actuated by no other motive than the purest parental love.

We wish we could speak with the same measure of confidence in regard to certain of the controversial matters deposed to in the affidavits. The opportunity which a judge always has of sifting the true from the false in oral testimony is denied to us, for no application has been made in either Court for leave to cross-examine either of the parties upon their affidavits. All the evidence is contained in documents ; and, unfortunately, some documents which could not fail to throw valuable light upon the case, such as the correspondence which, it is alleged, has passed with some regularity between the parties since the husband left America, are not before us.

After most careful consideration we hold the following facts established to our satisfaction. The father of the child—Edmund Arthur Lyons—was born in Belfast where he lived until May, 1927, when he went to America as the representative of a Belfast firm. He never became a naturalised American citizen. His residence in America was really dependent on the duration of his employment in that country. In the circumstances we unhesitatingly accept his statement that his domicile before and since his marriage has always been Northern Ireland. The mother of the child, on the other hand, was born in Hillsborough

County, Florida, which we, accordingly, infer was her domicile of origin. We have no evidence by affidavit of American law, but in the absence of such evidence we must assume that, as in this country, a woman acquires the domicile of her husband on marriage. The child's domicile necessarily followed that of his parents, and we therefore reject Mr. Murphy's submission that he was or is an American citizen—a submission which in our opinion is really unnecessary for the decision of this case.

Upon one point, which appears to us to be a matter of vital importance, arising as it does at the very inception of their married life, there is a most remarkable conflict of testimony between the parties. The wife contends that she was married to her husband in New Jersey on 12th June, 1931. This ceremony of marriage, she declares, took place in the house of a Methodist Minister, to which her husband brought her. There, according to her affidavit, they signed a register, and thereafter they lived and cohabited together at various places in America, though at her husband's request they did not take up house together. The reason for this, according to the wife, was that the husband represented to her that he was associated with the British Secret Service, and that he was not permitted to marry. Ultimately, when, according to the wife, disputes arose as to the validity of the marriage, they were re-married in the City Hall, in the City of New York, on 3rd October, 1931.

In reply to these circumstantial facts the husband denies in the most general terms that he was married to his wife on 12th June, 1931, or that she lived with him at any time before their marriage on 3rd October, 1931. On reading this denial of the earlier marriage one felt disposed at first to give it a charitable interpretation, namely, that the alleged ceremony of 12th June did not amount to a legal marriage; but his counsel, Mr. Beattie, was unable to accept this suggestion, and declared emphatically that it was his client's case that there was no earlier ceremony of marriage than 3rd October, 1931.

The materiality of this controversy becomes apparent

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

ANDREWS, L.J.

when we bear in mind that the child, Edmund Erle Lyons, respecting whom these proceedings have been brought, was born, a fully developed mature child, on 30th April, 1932, and his conception, believed to have been about 1st August, 1931, was, accordingly, prior to the date of marriage as represented by the husband. Mr. Beattie, repudiating any suggestion of bastardy, claims the child as his client's, asserting that he was at least born in wedlock. The fact remains, however, that on his client's contention the child was conceived in sin and his client was the seducer.

The next important fact to be considered is the husband's conduct towards his wife when he became aware of her pregnancy. The wife makes most serious allegations of cruelty against him. These were not denied in the undefended divorce proceedings to which reference will later be made ; but they have for the most part been controverted in the husband's affidavits in this matter. One such allegation, however, most specifically made by the wife, has not been denied or dealt with in any way, and it is of such a grave character that it is impossible to account for silence by mere oversight. The allegation is this—that he suggested to his wife that she should in some way procure an abortion and thus relieve herself from the " dreadful situation " in which he had placed her. This suggestion, the wife declares, she absolutely refused to adopt. If this evidence could have been controverted it certainly should have been. Failure to do so results in the case being presented before us as one in which a seducer, who failed in his effort to procure an abortion, is now resisting his wife's claims to the custody of their child.

The parties appear to have separated before the child was born, but subsequently came together again. Eventually in November, 1933, the husband took possession of the child and brought him over to the home of his parents in Belfast. He asserts that his reason for this action on his part was his wife's declared intention to go upon a prolonged road tour with a theatrical company—a fact emphatically denied by

his wife. Be the truth as it may, the husband returned to New York in February, 1934; and ultimately in May, 1934, the child was brought back to New York by the husband's sister. Immediately afterwards the wife went off to Florida taking the child with her. In so acting she was possibly hopeful that by appropriate divorce proceedings, which she immediately instituted there, she could obtain an order giving her the right to the custody of the child, and that she could so prevent any repetition of his removal out of the jurisdiction. In her Bill of Complaint she averred cruelty, including a threat of violence unless she would consent to an illegal operation to procure abortion. There is perhaps more than a doubt as to whether the husband was served in the ordinary way with this Bill of Complaint; but we are clearly of opinion that the husband had full actual notice of the proceedings a considerable time before the decree was made, yet he took no step to enter an appearance or to file a defence denying the allegations of cruelty thus specifically made. Accordingly, a decree of "absolute divorce" was made on 12th July, 1934; and by this decree it was further ordered that the wife should have the sole and exclusive custody and control of their child.

This decree was founded upon an averment in the Bill of Complaint that the wife was a bona fide resident of Hillsborough County, Florida. This averment was apparently sufficient to attract jurisdiction. The Bill contained no averment as to the domicile of either party, which, as above indicated, could not have been properly claimed as being Florida.

Now in our opinion the law is clear that our Courts will not recognise a decree of divorce as possessing any extra-territorial validity unless at the commencement of the proceedings the parties were domiciled within the jurisdiction of the Court pronouncing the decree. Nothing short of domicile can give a foreign Court jurisdiction to decree a divorce which will be valid in this country. A decree of divorce made in a foreign country without regard to domicile may according to the law of that country be valid within the limits of that country; but to a divorce so pronounced our Courts deny validity within our jurisdiction.

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

ANDREWS, L.J.

In our opinion, therefore, this decree of "absolute "divorce" (i.e., of divorce *a vinculo*) is not valid or legally binding in this country and, accordingly, the child's parents are in the eyes of our law still husband and wife. We would add that we are quite unable in the absence of compelling authority to accept Mr. Murphy's submission that on the principle, as he put it, of the greater including the less, we should treat this divorce decree as being something which in fact it is not, namely, a decree for judicial separation (i.e., of divorce a *mensa et thoro*). This would be, in our opinion, a very novel and dangerous method of validating an order which was invalid in this country. We are further in agreement with Lord Justice Best when he declined, merely out of regard to the so-called principle of comity of courts, to sever the decree and give legal effect to that portion of it which related to the custody of the child. The direction as to custody was based upon and was merely ancillary to the decree for divorce. The legal efficacy of the former is, accordingly, dependent on the legal validity of the latter. In no sense, therefore, is it legally binding on this Court. At the same time, in our opinion, these proceedings have this relevance that they show that the allegations now made by the wife against her husband were made three years ago in Florida, and that, being uncontradicted, they were accepted by the Court as the foundation of its decree.

These proceedings were followed by an attempt by the husband in the State of New York to obtain an order setting aside or nullifying the custody order. It would rather appear that these latter proceedings were for a writ of *habeas corpus*, and as such they may be entitled to greater weight in this Court. It is said that the Court in New York, whilst giving the husband a right of access, refused to set aside the custody order of the Florida Court. In the absence, however, of a duly authenticated copy of the Court's order it would be quite unsafe and improper for us to accord to this Order any validity which would make it legally binding upon this Court.

It was almost three months later—21st October,

1934—when an important event occurred which was the immediate cause for these proceedings. On the occasion of one of the husband's visits to his child, in defiance, as is alleged, of the warning given to him by the Judge who made the order in New York, the husband took possession of the child and immediately sailed for this country bringing him to the home of the husband's parents in Eglantine Place, Belfast, where he has since remained. The husband alleges as his justification for this violation of the order as to custody that the child was living in immoral conditions. This charge has not been established to our satisfaction, and it is in our opinion ill-founded. As such it recoils against the person who made it. In any event it would seem almost unnecessary for us to point out that if the husband believed the charge to be true, access to the Courts of Florida and New York were open to him ; and we cannot but look with disfavour upon the action of the husband in thus taking the law into his own hands. The custody of the child which he thus obtained was unlawful at least in the country from which the child was thus forcibly removed.

The facts to which we have referred are all matters of inducement which must carry great weight in determining the issue now before us. They are such that, had these proceedings been instituted by the wife forthwith, no court could have refused its writ. In our opinion, the whole difficulty in the present case arises from the one circumstance—the lapse of time—2 years and 9 months—which has taken place during which the child has found a new home in Belfast, where grandmother, aunt and uncle, have shown him every care and attention, and have bestowed upon him every comfort which could have been reasonably desired. As against the wife this delay is urged, if not as an absolute bar to remedy, at least as evidence of apathy or indifference upon her part—something which refutes her assertion of intense love and devotion to her child. This point also has required much thought ; but on careful consideration we accept the wife's explanation of the delay as caused by illness, accidents, and want of adequate means to make the

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

ANDREWS, L.J.

journey to this country and to maintain these necessarily costly proceedings.

Two other circumstances must be mentioned. The first is that the child's father, after remaining for upwards of a year—until February, 1936—in his mother's house, obtained employment in London which has since been his place of residence. During the period which has since elapsed the father has only seen his child on the occasional visits which he has paid to Belfast, and the further occasion when he took him for a short visit to London at the time of the Coronation. In no true real sense has he had the actual physical custody of his child; and, when Mr. Beattie claims that he has at least had the "legal" custody, it is to be remembered that this so-called legal custody had its inception in the commission by the husband of an illegal act.

The other circumstance is one for which the child's mother was rightly punished by Lord Justice Best. When he gave her the custody of the child on 25th June, two days after the making of the conditional order, she gave an undertaking in open Court that she would produce the child in Court on 30th June. In the interval she left Northern Ireland by aeroplane, taking her child with her, and was subsequently arrested in Liverpool where she had obviously gone with the intention of proceeding with the child to America. For this offence she was committed to gaol, where she remained until the learned Lord Justice delivered judgment on 19th July. When released her contempt was purged; and, whilst strongly condemning her conduct, we are of opinion that it may most properly be regarded as an act of extreme folly committed without due appreciation of its gravity, and that it was probably induced by a passionate longing on her part to get possession of her child. We have no doubt also that in acting as she did she was not unmindful of the manner in which she had herself lost the custody of her child.

These are the circumstances in which we have to determine the issue before us. The legal aspect of the case may be briefly stated. At common law the

father, as the natural head of the family, enjoyed rights regarding the custody of his children which were undoubtedly superior to those of the mother, however young the child might be. But this absolute right was found to be oppressive ; the rigour of the law was modified by statute, and the rights of the parents in such a case as this are now governed by the provisions of section 5 of The Guardianship of Infants Act, 1886. In clear terms this section declares the three matters to which the Court is to have regard :—(1) The welfare of the infant ; (2) the conduct of the parents ; and (3) the wishes as well of the mother as of the father. It is an Act of Parliament which was justly described by Lindley, L.J., as " essentially a mother's Act," greatly extending a mother's rights.

Now in the present case we get no help from the third of these statutory tests—each parent wishes for the custody of the child. As regards the second test—the conduct of the parents—we are of opinion, on the facts stated in this judgment, that the mother has superior claims. But the cases clearly establish that the primary and paramount consideration with the Courts must always be the first test mentioned in the section —the welfare of the infant. This must, therefore, be the principal consideration to weigh with us in our decision ; we must not allow our judgment to be influenced by any feelings either of sympathy for the mother or of animus against the father.

We have already acknowledged the care and attention which this child has received from all those residing in the house in Eglantine Place, which has been for almost three years his home. The child has lacked for nothing, save that it has been for him a " motherless " home. No one can quite take the place of a good mother for an infant child. The younger the child the greater the need of a mother's care ; and how much stronger, therefore, is this case than was the case of *In re O'Hara* (1), in which Lord Ashbourne, C., at p. 235, said : " The circumstances must be very " special which will prevent a mother from obtaining " the custody and control of her child of only eleven

(1) [1900] 2 I.R. 232.

C.A. 1937.

IN THE MATTER OF E. E. L., AN INFANT.

ANDREWS, L.J.

"years of age." It was in the same case that Holmes, L.J., (at p. 251), spoke of a mother being "entitled "*prima facie*, as guardian by nurture to the custody of "her child."

But it is urged that the mother's means will not enable her to provide the comforts of the Eglantine Place home. This cannot deprive her of her rights, especially as her present income would appear to equal, if it does not in fact exceed, that of her husband. The welfare of a child has been held time and again to mean welfare in its widest sense, and pecuniary benefit is often a very secondary consideration.

We have said that the child's home has been a "motherless" one. We should add that in present circumstances—and it is with these alone that we can deal—the home is also a "fatherless" one. In fact the father has delegated his parental duties to his mother and sister. This fact is fully recognised by Best, L.J., in the concluding words of his judgment where he speaks of the child being allowed to remain "with the consent of his father in the custody of his "paternal grandmother and her daughter." Whilst we must not be understood as deciding that such duties as are incidental to custody can never be successfully delegated by one parent as against the other, we are clearly of opinion on the facts of this case, fortified as they are by our interviews with both parents, that the mother's claims to the custody of her own child are superior. We, accordingly, give effect to our views by making absolute the conditional order of *habeas corpus*. We allow the wife the costs of the appeal, but make no order as to the costs in the King's Bench Division, in which no costs were allowed by Best, L.J.

We now direct that the child be handed over in Court to the custody of the mother.

Solicitor for the appellant: *J. Morris McKee.*
Solicitor for the respondent: *Samuel Henry.*

J. McC.

In re SPENCE, DECEASED: WILKINSON v. ARLOW & ANOTHER (1).

Ch.D. 1937.

Nov. 15.

Will—Construction—Bequest of entire Income and Benefit of Business—Whether Stock-in-trade and Book Debts included.

The testatrix by her will gave all her property to her trustees and after making certain bequests continued with the words "my "trustees to permit my brother C. to have the entire income and "benefit from any business carried on at 9 Mabel Street, Belfast, "and I give my trustees full power and authority to carry on the said "business during the lifetime of my said brother and on the decease "of my said brother my entire interest in the premises 9 Mabel "Street, and also in the said business carried on in the foundry to "vest in my nephew A. absolutely." The business was carried on by the trustees during C.'s life. On the death of C.,

Held, that the terms of the will showed that the gift to C. carried the book debts and stock-in-trade in addition to the goodwill, of testatrix's business and consequently that the stock-in-trade and book debts due at the death of C. passed to A. subject to such obligations as had been incurred in the management of the business during C.'s lifetime.

Construction Summons.

Mary Jane Spence died on 16th January, 1937, having made her last will dated 13th January, 1937. In her said will the testatrix appointed the plaintiff her executor and trustee, and probate of the said will was granted to him on 22nd April, 1937. By her said will the testatrix dealt with her business as follows:—"My trustees to permit my brother, George Crothers, "to have the entire income and benefit from the "residue of my premises in Mabel Street, Belfast, and "also the income and benefit from any business carried "on at 9 Mabel Street, Belfast, and I give to my "trustees full power and authority to carry on the said "business during the lifetime of my said brother "without being personally liable for any losses which "may arise from so carrying on said business. . . ."

(1) In the Chancery Division before Megaw, J.

Ch.D. 1937.

IN RE SPENCE, DECEASED: WILKINSON v. ARLOW AND ANOTHER.

" On decease of my said brother, George, my entire " interest in the premises 9 Mabel Street, Belfast, and " also the said business carried on in the foundry to " vest in my nephew, Alexander Arlow, absolutely." The said George Crothers, having survived the testatrix only twelve days, died on 28th January, 1937. The said foundry business had been carried on during testatrix's life and following the short period intervening between her death and that of her brother, George Crothers, the defendant, Alexander Arlow, went into possession of the premises at 9, Mabel Street, and since then had personally carried on the business of the foundry and had taken over the plant, machinery and materials and the benefit of the goodwill which existed at the death of the said George Crothers. The said Alexander Arlow claimed to be entitled to the stock-in-trade and to the business debts due to the testatrix at the date of her death.

The summons was taken out to determine whether upon the true construction of the said will and in the events that had happened the gift under the said will of " my entire interest in the said business carried on " in the foundry " included :—

(*a*) Book debts of testatrix's business at the date of her death, or, whether such debts fell into residue ;

(*b*) Stock-in-trade of said business at the date of her death, or, whether such stock-in-trade fell into residue.

Porter, K.C., for Alexander Arlow.

In *Jarman on Wills*, 1930 Edition, the author says at page 1281 : " Whether a bequest of the testator's " interest in a business passes capital, undrawn profits, " stock-in-trade, etc., seems to depend to some extent " on the nature of the business and on the provisions " of the will."

In re Barfield : Goodman v. Child (1), a solicitor gave by his will to C., his partner, all his share and interest in their business conditional on his acting as his solicitor to his estate free of charge. At his death moneys

(1) 84 L.T. 28.

were standing to the credit of the testator's capital account and these were undrawn profits. The Court held that as the goodwill had been held in such a business to be practically non-existent, to include that only would be to give no effect to the gift and that accordingly, having regard to the facts known to the testator, his intention was that the gift should pass both the share of capital and the undrawn profits.

In re Hawkins: Hawkins v. Argent (1), a testator bequeathed his business and plant at D. street to X, his brother, and Y his manager, in equal parts and the will proceeded: " I will that they pay Miss A. £10 " per week during her life." It was held that the effect of the bequest was to give the house, bank balance, and book debts to the legatees and that they were bound to pay the £10 per week out of the assets, but were not personally liable.

In the present case the goodwill of the business is of no value. It was clearly the intention of the testatrix that the business should be transferred as a going concern and that the bequest should include book-debts and stock-in-trade of the foundry.

In the case of *Delaney v. Delaney* (2), where a bequest of " my said business and the goodwill thereof, " with the premises in which the same shall be carried " on " was held not to include stock-in-trade and debts due the business, the goodwill of the business was very valuable.

Nicholson for the executor.

Delaney v. Delaney (2) is nearest to the present case on the facts. The value of the goodwill of the business had no bearing on the decision. In that case Chatterton, V.C., said at page 67: " Ordinarily speak-" ing, business is synonymous with trade, and means, " in my opinion, the process of buying and selling, or " manufacturing or the like, without comprehending " the capital employed, or the stock-in-trade, whether " of material or manufactured goods. It would, " therefore, require something in the context to include " the extraneous subjects or any of them. I am unable

(1) 109 L.T. 969. (2) 15 L.R. Ir. 55.

Ch.D. 1937.

IN RE SPENCE, DECEASED: WILKINSON v. ARLOW AND ANOTHER.

"to discover anything in the context here which has "such an operation. On the contrary, the context "appears in the opposite direction." In this case there is nothing in the context which would suggest that it was the testatrix's intention that the book debts and stock-in-trade of her business should pass under her will.

In *In re Deller's Estate : Warman v. Greenwood* (1), the testator bequeathed to A. absolutely "the business "of — now carried on by me at —, and all the good-"will, stock-in-trade, fixtures and effects which at "the time of my decease shall be employed by me "therein, charged nevertheless with and subject to "the payment of my trade debts due and owing me in "connection with my said business." It was held that A. was not entitled to the book debts owing at the time of his death to the testator in his business.

MEGAW, J.

MEGAW, J. : This is a question of some difficulty and the decisions on the matter are conflicting.

On the facts being first presented to me I should have come to the conclusion apart from authority that it was the intention of the testatrix to give the house and business as a going concern including business debts and goodwill. But one has to face the fact that there is a number of decisions which can hardly be mutually reconciled.

Each will has to be interpreted on its own particular words. I have to give effect to the intention of the testatrix as expressed in the language of the will. Mr. Nicholson relied upon the cases of *Delaney v. Delaney* (2) and *In re Deller's Estate* (3).

The former is a judgment of Chatterton, V.C., and I think it can hardly be construed as enunciating any general rule of construction of the meaning of "business." On the wording of this will the meaning is ambiguous. It might be interpreted either as including the stock-in-trade and book debts or not.

The cases cited by Mr. Porter at any rate show that the meaning of business in some cases includes stock-in-trade and book debts. In considering the words

(1) 1888 W.N. 62.
(2) 15 L.R. Ir. 55.
(3) 1888 W.N. 62.

of the will I find that the lady has given her property to her trustees and after certain bequests continues with the words: " My trustees to permit my brother, " George Crothers, to have the entire income and " benefit from any business carried on at Number 9 " Mabel Street, Belfast." That must have meant something as to what George was to have which I should say included an interest in the capital of the business taken as a going concern. The will goes on to say: " and I give my trustees full power and authority " to carry on said business during the lifetime of my " said brother." That is a licence to carry on the business and the lady's manifest intention was that the business would be carried on for the benefit of George Crothers. The will continued: " on the decease of my " said brother George my entire interest in the pre- " mises, Number 9 Mabel Street, Belfast, and also in " the said business carried on in the foundry to vest in " my nephew, Alexander Arlow, absolutely." I do not think that referred to goodwill and goodwill alone. In my opinion it referred to the capital comprised in the business. The governing intention was that the whole undertaking was given as a going concern. The testatrix, in my opinion, as gathered from the words of the will, contemplated that the business should be carried on by *both* Arlow and her brother for the benefit of the former during his life and on his death that it should go to George Arlow in its then state. No doubt the gift was in the form of a power, the trustees could have disposed of it had they wished but they did not exercise the power.

I have come to the conclusion with considerable hesitation that the terms of the will show that the gift carried book debts as well as the stock-in-trade of the testatrix's business and that the book debts due at the death of George Crothers pass to Arlow subject, of course, to such obligations as had been incurred in the management of the business during George Crother's life.

Solicitor for Alexander Arlow: *William Anderson.*
Solicitors for the plaintiff: *John Alexander & Son.*

C.A. 1937.

LUKE v. EGLINTON BAKERY, LTD. (1).

Nov. 3.

Practice—Action for Negligence—Payment of Money into Court—Motion to remit—Whether payment of money into Court deprives defendant of right to move to remit—R. S. C. (N.I.) 1936, *Order* 22, *r.* 1.

The plaintiff brought an action for negligence during the Long Vacation and the defendants attempted to lodge money in Court in accordance with Order 22, r. 1. They were unable to do this as the Accountant-General's office was closed. The defendants then applied to the Vacation Judge who made an order giving the defendants leave to lodge the money and authorising the Registrar to receive it and retain it pending the opening of the Accountant-General's books.

On the hearing of a motion to remit the action, Andrews, L.J., made an order remitting the action and transferring the money lodged in Court to the County Court. The plaintiff appealed to the Court of Appeal.

Held, by the Court of Appeal (Best, L.J., and Brown, J.), that the lodgment of the money in Court deprived the defendant of the right to move to remit the action as the defendants by so lodging the money had recognised and accepted the jurisdiction of the High Court.

APPEAL by the plaintiff from an order of Andrews, L.J., dated October 15th, 1937, remitting for trial to the Recorder of Belfast an action brought by the plaintiff for loss and damage sustained by the plaintiff by reason of the alleged negligence of the defendants.

The plaintiff was the occupier of a shop at Main Street, Whiteabbey, County Antrim, at a rent of 11*s.* 0*d.* per week. The shop consisted of a cheap wooden structure in the nature of a " lean-to " shed. The plaintiff carried on business as a cobbler and boot repairer and in addition carried on a fish and chip business on the same premises in the evening, and made occasional sales of bread and pastries. His account with the defendant firm amounted on an average to a sum of about 1*s.* 9*d.* to 2*s.* 0*d.* per week for pastries and bread supplied and he made all his purchases of bread and pastry from the defendants.

(1) In the Court of Appeal before Best, L.J., and Brown, J.

The plaintiff alleged loss of turnover in connection with the sale of pastries in which he alleged a screw-nail was discovered in a fruit square which he alleged he sold to a customer.

An affidavit filed on behalf of the defendants contained the averment that all proper precautions were taken in the manufacture and sale and delivery of the defendant's goods and that the nail alleged to have been found in the fruit square probably found its way there in the course of the plaintiff's boot-repairing business.

It was also stated in this affidavit that the plaintiff had no visible means of paying the defendants' costs should a verdict not be found in his favour.

The action was instituted during the Long Vacation and the defendants attempted to lodge money in Court in accordance with Order 22, r. 1. They were not able to do this as the Accountant-General's office was closed.

The defendants then applied to the Vacation Judge who made an order giving the defendants leave to lodge the money and authorising the Registrar to receive the money and retain it pending the opening of the Accountant-General's books.

On the hearing of the motion to remit, Andrews, L.J., made an order remitting the action. Andrews, L.J., also ordered without expressing any opinion as to the effect on the question of the costs of the action of the lodgment in the High Court by the defendants of the sum of £10 in satisfaction of the plaintiff's claim, and solely with the object of avoiding the necessity for a subsequent application to the Court for the payment out of that sum to the person who might be entitled thereto that the Accountant-General should transfer this sum of £10 to an account in the books of the Clerk of the Crown and Peace for the City of Belfast and County of Antrim entitled in the action, to abide the order of the Recorder.

E. S. Murphy, K.C., and *Topping* for the appellant:

Order 22, r. 1 provides that "In any action for a "debt or damages or in an Admiralty action, the

C.A. 1937.

LUKE v. EGLINTON BAKERY, LTD.

"defendant may at any time up to joinder of issue, "upon notice to the plaintiff, or may afterwards by "leave of the Court, pay into Court a sum of money "in satisfaction of the claim or (where several causes "of action are joined in one action) in satisfaction of "one or more of the causes of action." This rule clearly applies only to High Court actions.

Having lodged the money the defendants had treated the action as a High Court action, while at the same time they were seeking to remit the action.

We submit that Andrews, L.J., had no authority to remit the action. It was quite clear that he could not affect the money lodged in Court, with the remarkable result that the money remained in the High Court in an action which ceased to be a High Court action.

We submit that the defendants had accepted and invoked the jurisdiction by lodging the £10 and the defendants could not at the same time move to remit the action to the County Court.

The lodgment of the money in Court debars the defendant from moving to remit.

J. D. Chambers for the respondents:—

The procedure is unique but the new rule applicable was designed to stop small actions being carried on at great cost. It would have been impossible to adopt this procedure prior to the passing of the new Rules. The plaintiff could not be deceived into thinking that the action was going on in the High Court.

The defendants have not waived their rights to make an application to remit by lodging money in Court.

Waiver is described in *Halsbury*, vol. 13, page 165, par. 197, as "The abandonment of a right."

The entry of an unconditional appearance is very different from lodgment in Court.

Order 22 was devised to spare the litigants the expense of contesting flimsy claims. Such a case as the present would be beneath the dignity of the High Court.

Under the existing rule money can be lodged at any time. The defendants by obeying the rule cannot be regarded as having waived something.

I submit that the passage in *Halsbury* giving the definition of waiver concludes the matter.

I submit that the respondents have made a legitimate use of Order 22, r. 1.

The respondents cannot be treated as having waived their right to move to remit.

In all the circumstances of the case, I submit that the Court should not hold that there was waiver by implication.

Murphy, K.C. (in reply) :—

It was never suggested in the decided cases that there must be some hardship or surprise.

The defendant has recognised that this action is and should be in the High Court. Whatever was done by the Vacation Judge was only a matter of machinery.

McKenny v. Lord Mayo (1) does not deal with the point at issue in the present case.

We rely on *Molloy v. Donegal Railway Company* (2), where an application to remit was made by a defendant who had entered an unqualified appearance and called for a statement of claim. The motion was refused.

In the present case the fact of lodgment in Court shows that the defendant has adopted the High Court jurisdiction, having so availed himself of that jurisdiction he cannot seek to remit.

There is no provision enabling the County Court to deal with this lodgment.

The respondents have taken advantage of the High Court procedure and are not entitled to have the action remitted.

BROWN, J., delivered the judgment of the Court as follows :— BROWN, J.

The matter comes before the Court on a novel point which has never been raised before, whether a payment into Court debars a defendant from moving to remit.

Order 22, r. 1 (1), provides that : " In any action for " a debt or damages or in an Admiralty action, the " defendant may at any time up to joinder of issue, " upon notice to the plaintiff, or may afterwards by

(1) 32 I.L.T.R. 118. (2) 3 N.I.J. 257.

C.A. 1937.

LUKE v. EGLINTON BAKERY, LTD.

BROWN, J.

"leave of the Court, pay into Court a sum of money "in satisfaction of the claim or (where several causes "of action are joined in one action) in satisfaction of "one or more of the causes of action." Rule 3 of this Order provides that: "the notice shall be as in Form 4 "in Appendix B, with such variations as circumstances "may require, and shall state whether liability is "admitted or denied."

It was admitted by both parties that defendant had not a strong case on the merits, and on the hearing of the motion to remit, Lord Justice Andrews made an order remitting the action, and making an addendum to his order by which he transferred £10 in Court to the County Court.

The action was instituted during the Long Vacation and the defendants attempted to lodge money in Court in accordance with Order 22. That could not be done as the Accountant-General's office was closed. The defendants then applied to the Vacation Judge, who made an order giving the defendants leave to lodge the money and authorising the registrar to receive the money and retain it pending the opening of the Accountant-General's books.

That was a mere matter of machinery. The question, however, now comes before us whether the lodgment of money in Court deprives the defendants of the right to move to remit the action.

It has always been held that to enter an unconditional appearance or to take any step in an action amounted to recognising the jurisdiction of the High Court and deprived the defendant of his right to move to remit.

It was contended in the present case that the defendants by lodging the money in Court had recognised the jurisdiction of the High Court and had accepted that jurisdiction.

Mr. Chambers, on the other side, said "No," and dealt more with the question of waiver. I do not think that waiver is the line on which this case should be dealt with. Waiver is not the principle applicable. The principle applicable is whether or not this rule was intended to apply only to High Court actions.

There is no method that I know of by which money could be lodged in the County Court on civil bill brought for tort. By that device Mr. Chambers would have succeeded in lodging the money in the County Court in an action for tort for which there was no procedure.

We are of opinion that the rule clearly intended that only High Court actions should be dealt with. The lodging of money under the rule was a High Court procedure and we are both agreed that Mr. Murphy's contention, without merits as it is, is correct, and that the lodgment of the money is a bar against a motion to remit.

We are not deciding what the effect would be if the money had been lodged without prejudice to a motion to remit.

Whether that is possible or not, we make no ruling on that point, which may have to be decided on another day.

The order made by Lord Justice Andrews must be reversed with costs to the plaintiff in the appeal.

Solicitor for the appellant : *T. E. Alexander.*
Solicitor for the respondents : *R. B. MacKeown.*

J. McC.

K.B.D. 1937.

Dec. 20.

THE KING (MOORE) v. NEWTOWNSTEWART MODEL DAIRY, LTD. (1).

Merchandise Marks—Indication of Origin—Empire Produce—Imported Goods—Name or Trade Mark of Manufacturer or Trader in the United Kingdom—"Conspicuously"—"Empire"—Whether Word must be used alone—"The Produce of the Finest Pastures in the British Empire"—Whether sufficient Indication of Origin—Merchandise Marks Act, 1926 (16 & 17 *Geo.* 5, *Ch.* 53), *sections* 1 (1), 10 (1)—*Merchandise Marks* (*Imported Goods*) *No.* 1 *Order*, 1932, *Article* 3 (*a*).

Section 1 (1) of the Merchandise Marks Act, 1926, provides that "It shall not be lawful to sell . . . in the United Kingdom any "imported goods to which there is applied any name or trade "mark being, or purporting to be, the name or trade mark of any "manufacturer, dealer or trader, or the name of any place or district "in the United Kingdom unless the name or trade mark is accom-"panied by an indication origin."

By section 10 (1) "Indication of Origin," means, at the option of the person applying the indication, either—(*a*) in the case of goods manufactured or produced in any part of His Majesty's Dominions outside the United Kingdom the word "Empire" or, (*b*) a definite indication of the country in which the goods were manufactured or produced; the indication being given in either case, conspicuously.

By Article 3 (*a*) of the Merchandise Marks (Imported Goods) No. 1 Order, 1932, indication of origin shall be marked indelibly and in a conspicuous manner in plain block letters not less than one-twelfth of an inch in height.

The respondents, who carried on business at Newtownstewart, Co. Tyrone, Northern Ireland, sold butter produced in Australia wrapped in a wrapper at the top of which were the words in small block letters more than one-twelfth of an inch in height: "The "Produce of the Finest Pastures in the British Empire." The centre of the wrapper bore the words in large letters: "The Famous "Mourne Valley Brand"; "Pure Pasteurised Butter," and below in small letters was the name and address of the respondents.

The magistrate held that the words: "The Produce of the Finest "Pastures in the British Empire" were an indication of origin as required by the said Act.

Held, that the wrapper did not comply with the provisions of the Statute and that the finding of the resident magistrate was wrong in law.

(1) In the King's Bench Division before Brown and Megaw, J.J.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the Resident Magistrate sitting at Newtownstewart Petty Sessions as follows :—

This is a case stated by me sitting at Newtownstewart Petty Sessions in the County of Tyrone, on 16th day of September, 1937, pursuant to the Summary Jurisdiction Act, 1857, on the application of the complainant (who is dissatisfied with my determination hereinafter set forth as being erroneous in point of law) for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At Newtownstewart Petty Session, held on 16th day of September, 1937, the complainant charged by summons the Newtownstewart Model Dairy, Limited, "that you on 11th May, 1937, at Newtownstewart, "in the County of Tyrone, sold imported goods, to "wit, imported butter, to which was applied the name "of a place or district in the United Kingdom, to wit, "Newtownstewart, without such name being accom- "panied by an indication of origin, in contravention "of the Merchandise Marks Acts, 1887-1926."

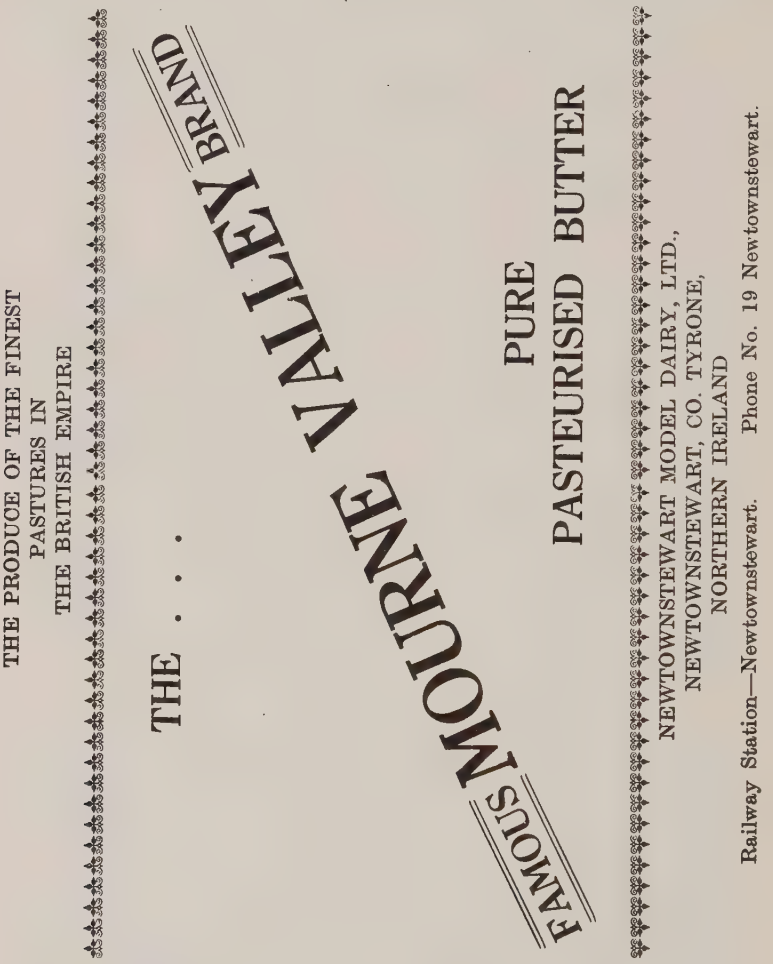
On the hearing of the said complaint evidence was given on behalf of the complainant by Mr. Armour Alcorn, an inspector of the Ministry of Agriculture, that on the 11th day of May, 1937, he visited the defendant's creamery at Newtownstewart and found two female employees of defendants making up one lb. rolls of butter, each of which they wrapped in a wrapper, a *facsimile* of which is reproduced below. Mr. Alcorn bought one pound of this butter wrapped in a similar wrapper and paid the head dairymaid 1*s.* 1*d.* for same.

The solicitor for the complainant contended that the printing on the said wrapper in the following words :—"The Produce of the finest pastures in the "British Empire" was not an "indication of origin" as required by the Merchandise Marks Acts, 1887-1926 (*vide* section 1 of the Merchandise Marks Act, 1926), and was not in compliance with section 10 (1) of the said Act of 1926, and compared with the other wording on the wrapper, "The famous Mourne Valley Brand

K.B.D. 1937.

THE KING (MOORE) v. NEWTOWN-STEWART MODEL DAIRY, LTD.

"Pure Pasteurised Butter Newtownstewart Model "Dairy, Ltd., Newtownstewart, Co. Tyrone, Northern "Ireland," was not given "conspicuously" as required by the said section 10 (1). That the word "Empire" should stand alone and not in conjunction with any other series of words, and that the words "the Produce



"of the finest pastures in the British Empire" was indicative of quality and not an indication of origin.

The solicitor for the defendants submitted that no offence had been committed and that the wrapper complied with the provisions of Article 3 of the Merchandise Marks (Imported Goods) No. 1 Order,

1932, made under said Act in as much as the origin was indelibly marked in a conspicuous manner in plain black letters not less than one-twelfth of an inch in height, and that the words " British Empire " were a clear indication of origin as the Merchandise Marks Act, 1926, was passed with a view of showing whether the butter was produced in the United Kingdom, British Empire or Foreign, and that the words " British Empire " were even more distinctive of the place of origin than the word " Empire."

I came to the conclusion that the words " The " Produce of the finest pastures of the British Empire " were an indication of origin as required by the said Act and dismissed the summons with £2 2*s.* 0*d.* costs, but agreed on the application of the solicitor for the complainant to state a case for the opinion of the High Court, and I further stated that if I was wrong in dismissing such summons I would fine the defendant company £1 0*s.* 0*d.* with £2 4*s.* 0*d.* costs.

Beattie, K.C., and *Dougherty* for the Crown :—

Section 1 (1) of the Merchandise Marks Act, 1926, provides that " It shall not be lawful to sell, expose for " sale, or, by way of advertising goods of some kind, " distribute, in the United Kingdom, any imported " goods to which there is applied any name or trade " mark being, or purporting to be, the name or trade " mark of any manufacturer, dealer or trader, or the " name of any place or district in the United Kingdom " unless the name or trade mark is accompanied by " an indication of origin."

By section 10 (1) " ' Indication of origin ' means at " the option of the person applying the indication, " either (*a*) in the case of goods manufactured or " produced in any foreign country, the word ' foreign,' " and in the case of goods manufactured or produced " in any part of His Majesty's Dominions, outside the " United Kingdom, the word ' Empire ' ; or (*b*) a " definite indication of the country in which the goods " were manufactured or produced ; the indication " being given in either case, conspicuously."

K.B.D. 1937.

THE KING (MOORE) v. NEWTOWN-STEWART MODEL DAIRY, LTD.

Article 3 (*a*) of the Merchandise Marks (Imported Goods) No. 1 Order, 1932, provides that the indication of origin shall be marked indelibly or in a conspicuous manner in plain block letters not less than one-twelfth of an inch in height.

In construing these sections it is important to see what was the purpose of the Act of 1926. The intention of the legislature was that intending purchasers should know whether the goods they were buying were produced in the United Kingdom or in the British Empire.

In *Gallaher v. Lynn* (1) Lord Atkin said: "It is "well established that you are to look at the 'true "'nature and character of the legislation'"; *Russell v. The Queen* (2), "the pith and substance of the "legislation."

It is clear from the wording of section 10 (*a*) that the legislature intended that where the word "Empire" was used to indicate the origin of produce the word should be used alone. The governing word in the section is "conspicuously." The word "Empire" as used in conjunction with nine other words is the least prominent word on the wrapper.

This is a cunningly devised wrapper made with the intention of suggesting that the butter in question had its origin in the Mourne Valley, County Tyrone, while at the same time technically satisfying the statutory requirements. The words "The Produce of the Finest "Pastures in the British Empire" are indicative of quality and are not an indication of origin within the meaning of the Act.

[They also referred to the judgment of Bailhache, J., in *Holmes v. Pipers, Limited* (3).]

MacDermott, K.C. and *Sheil* for the respondents:—

The real issue is whether the wrapper shows the indication of origin as required by the statute. No question as to the type used or its size arises. The use of the word "Empire" is a sufficient compliance with the statute having regard to section 10 (1) of the

(1) [1937] A.C. 863, 870.
(2) 7 App. Cas. 839.
(3) [1924] 1 K.B. 107, 109.

Act of 1926. There is no statutory obligation to use the word "Empire" alone. The fact that it is used in conjunction with other words does not mean that an offence has been committed. *World's Tea Company v. Gardner* (1). That case arose under section 6 of the Margarine Act, 1887, which provided that "every "person selling margarine by retail . . . shall in every "case deliver the same to the purchaser in or with a "paper wrapper on which shall be printed in capital "letters, not less than a quarter of an inch square, "'Margarine'." It was there held that it was not necessary that the word "Margarine" should be the only word printed on the wrapper required by the Act to be delivered to the purchaser on a sale of margarine by retail, so long as it was printed thereon in capital letters of the required size. This decision was recognised by the Sale of Food and Drugs Act, 1899, which by section 6 (2) provided that "no other printed matter shall appear on the "wrapper."

There is no corresponding statutory requirement here and, accordingly, the question is really whether the words used in conjunction with "Empire" so obscure or cloud it as to prevent it being an indication of origin. That is a question of fact which has been found in our favour.

Alternatively, the finding on this point is amply warranted by the evidence. Neither the type used nor the accompanying words: "The Produce of the "Finest Pastures in the British Empire" cloud or detract from the intimation conveyed by the word "Empire."

"The British Empire" is only an amplification of what is meant by "Empire" and, butter being the commodity, the earlier words: "The Produce of the "Finest Pastures in" cannot detract from what is meant by "The British Empire" or "Empire."

Beattie, K.C. (replied):—

BROWN, J.: We have both come to the same conclusion in this matter. BROWN, J.

(1) 59 J.P. 358, 359.

K.B.D. 1937.

THE KING (MOORE) v. NEWTOWNSTEWART MODEL DAIRY, LTD.

BROWN, J.

This appeal comes before us by way of case stated by the resident magistrate sitting at Newtownstewart Petty Sessions.

At the said Petty Sessions a prosecution was brought on 16th day of September, 1937, whereby the complainant charged by summons the defendants "that "you on the 11th day of May, 1937, at Newtownstewart, "in the County of Tyrone, sold imported goods, to wit, "imported butter, to which was applied the name of a "place or district in the United Kingdom, to wit, "Newtownstewart, without such name being accom-"panied by an indication of the origin, in contra-"vention of the Merchandise Marks Acts, 1887-1926."

The facts were that the Newtownstewart Dairy sold butter which was empire butter wrapped up in wrapper which we have before us. At the top of this label the words, "The Produce of the finest pastures "in the British Empire," are printed in block letters not less than one-twelfth of an inch in height. In the centre of the label in much larger letters the words: "The Famous Mourne Valley Brand" "Pure Pasteur-"ised Butter," and at the bottom in smaller letters, "Newtownstewart Model Dairy, Ltd., Newtown-"stewart, Co. Tyrone, Northern Ireland."

Section 1 (1) of the Merchandise Marks Act, 1926, provides that: "It shall not be lawful to sell, or expose "for sale . . . in the United Kingdom, any imported "goods to which there is applied any name or trade "mark being, or purporting to be, the name or trade "mark of any manufacturer, dealer or trader, or the "name of any place or district in the United Kingdom, "unless the name or trade mark is accompanied by "an indication of origin."

By section 10 (1) "'Indication of Origin' means at "the option of the person applying the indication, "either:—

"(*a*) in the case of goods manufactured or pro-"duced in any foreign country, the word 'foreign' "and in the case of goods manufactured or produced "in a part of His Majesty's Dominions, outside the "United Kingdom, the word 'Empire'; or

"(*b*) a definite indication of the country in which "the goods were manufactured or produced; "the indication being given in either case, con- "spicuously."

The defendants say that the wrapper which we have before us complies with the Act and say that the magistrate was right in dismissing the summons.

The sections of the Act which I have just quoted mean that such wrapper must bear either the word "Empire" or a definite indication of the country of origin. It sets out these in two ways and only two. The first is by using the word "Empire" which means not produced locally. The second way does not arise.

It is argued by the defendants that because the word "Empire" is used on the label it complies with the section. The words used on the label were "The "Produce of the finest pastures in the British Empire." That might be interpreted as being a product of the Empire as distinct from a home product, but in my opinion it does not comply with section 10.

The intention of the section was that the indication of origin should be clear and conspicuous.

I have come to the conclusion that the label does not comply with the provisions of the Act and that therefore the appeal should be allowed with costs.

MEGAW, J.: One does find that the word "Empire" has been used on the label but without knowing any of the statutory requirements in such a case I should have little doubt in my own mind that it was a cunningly devised label made with the intention of advertising the goods, and suggesting that they had their place of origin in the part of the British Empire known as the Mourne Valley while at the same time technically satisfying the requirements of the statute. I should have come to the conclusion from reading the label that the Newtownstewart Model Dairy, Ltd., were dealing with home and not imported products, and that these products had all the virtues to be found in the pastures of the Mourne Valley. This, however, is not a proceeding in which passing off is involved. We have the statutory provisions before us and it

K.B.D. 1937.

THE KING (MOORE) v. NEWTOWN-STEWART MODEL DAIRY, LTD.

MEGAW, J.

is on the Merchandise Marks Act, 1926, that the case has been brought and we have to determine whether this label satisfies them.

Section 1 of the Merchandise Marks Act, 1926, requires that when goods are sold or advertised for sale in the United Kingdom any imported goods to which there is applied any name or trade mark the name or trade mark must be accompanied by an indication of origin. By section 10 (1) where the goods are produced in a part of His Majesty's Dominions, outside the United Kingdom, the indication of origin may be either the word " Empire " or a definite indication of the country in which the goods were produced, the indication being given in either case conspicuously.

In this case the appropriate word to indicate the origin of the goods would be " Empire." The defendants say that their label satisfies this requirement. But here the word is not used alone. The word " Empire " is used in an advertising sentence along with nine other words equally conspicuous and, as I have said, evasive. In my opinion those are not intended to indicate but not obscure the place of origin. Indication must be given conspicuously. When one looks at the wrapper one finds at the top of the label the words : " The produce of the finest pastures " of the British Empire," which, while they are printed in block letters and fulfil the requirement as to the height of the letters, one must look at them relatively to the other words used on the label. In my opinion the word " Empire " on this label has its significance so obscured by the words in which it occurs that its use is not a compliance with the Act.

It is contended that the Resident Magistrate decided a question of fact ; I do not think it was decided as a question of fact. It seems to me that if it could be so regarded it falls within the exception that if such conclusion is manifestly based upon a material error in law this Court is entitled to set his decision aside. It is manifest in this case that the magistrate was of opinion that because the word " Empire " had a place on the label and that the letter measurements complied with the Act no offence was committed.

This is a wrong conception of the law. It would make the provisions of the statute ridiculous if a person by the mere use of the word " Empire " in any sentence occurring on a label if it were of the specified type satisfied the provisions of the Act, and we must conclude that the requirements of the law have not been complied with and that the label rather obscures than indicates the place of origin.

For these reasons I agree with my colleague, Mr. Justice Brown, that the appeal should be allowed with costs.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitors for the respondents : *Shields & Murnaghan.*

J. R.

C.A. 1937.

Nov. 8, 9, 10, 30.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD (1).

Road and Railway Transport Act (Northern Ireland), 1935, (25 & 26 *Geo.* 5, *c.* 15) *Special Case stated for opinion of Supreme Court—Road and Railway Transport Act (Northern Ireland)*, 1935, *section* 7 (4)—*Establishment of Road Transport Board and transfer of existing road transport undertakings—Provisions for Compensation—Road and Railway Transport Act (Northern Ireland)*, 1935, *section* 6 (*c*)—*Validity—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sections* 4 *and* 5—*The Parliament of Northern Ireland shall not make a law so as either directly or indirectly to take any property without compensation—"Special circumstances" section* 6 (*c*)—*Effect of provision that "the tribunal shall have regard to all the circumstances of the case"—Section* 9 (1) (*a*)—*Proper basis of compensation where undertaking acquired from owner-manager—Method of determining consideration payable for transferred undertakings—"Property," meaning of, in Government of Ireland Act*, 1920, *sec.* 5 (1).

In the year 1925 the claimant commenced the business of a road motor undertaking for passenger transport. Subsequently he also engaged in the business of a funeral undertaker and taxi proprietor. All these activities were still being carried on by him when the Road and Railway Transport Act (Northern Ireland), 1935, came into effect. The principal object of that Act was to provide for the establishment of a Road Transport Board for Northern Ireland, and for the transfer to that Board of various road transport undertakings.

Section 4 provided that it should be the duty of the Board so to exercise their powers as to secure a system of transport properly co-ordinated and giving efficient, economical and convenient transport services to the public.

The procedure for the transfer of transport undertaking was prescribed by section 5 of the Act, and in compliance with these provisions, a notice was duly served upon the claimant intimating that the Board would acquire his road motor undertaking. Such undertaking was to be transferred and to vest in the Board on 3rd December, 1935. The claimant's activities as taxi proprietor and funeral undertaker were excluded from the scope of the Act by the

(1) In the Court of Appeal before Andrews, L.J., Best, L.J., and Brown, J.

provisions of section 15 (4) (*a*) and (*g*), and the notice only affected his road motor undertaking. The prescribed vesting order was made and after negotiations for a settlement had failed, the claimant gave notice to the Board requiring his claim to be heard by the Arbitration Tribunal set up under the Act. Schemes for the compensation payable to the claimant were duly lodged by the Board and the claimant, in accordance with the provisions of the Act and the rules which had been made.

The offer of the Board contained in their scheme amounted to £22,355. Of this sum £6,905 represented the consideration for physical assets, payable as to £5,000 in cash, and as to £1,905 in Transport A1 Stock, whilst the remaining £15,450 represented the consideration for goodwill, which it was proposed to discharge by issuing to the claimant Transport B Stock of the nominal value of £15,450.

The consideration demanded by the claimant amounted to £45,026, of which £9,916 represented physical assets, whilst the claim for severance amounted to £1,550, and goodwill to the balance of £33,560. Nothing was stated in the claimant's scheme in regard to the proposed method of payment.

The claimant declined to accept the offer of £22,355, and requested in pursuance of Regulation No. 2 of the Road Transport Arbitration Regulations, 1936, that the amount of consideration payable should be determined in accordance with the provisions of the Act.

The arbitration was afterwards held and various submissions were made on behalf of the respective parties.

As a result of these submissions a Special Case was stated for the opinion of the Supreme Court under section 7 of the Road and Railway Transport Act (Northern Ireland), 1935. This Special Case contained several questions which it was desired should be answered by the Court.

Amongst these questions were: (*a*) whether in view of the provisions of section 5 (1) of the Government of Ireland Act, 1920, providing that the Parliament of Northern Ireland shall not make a law so as either directly or indirectly to take any property without compensation, the provisions of section 6 (*c*) of the Road and Railway Transport Act (Northern Ireland), 1935, which provide for part payment in stock, are valid; (*b*) whether in respect of so much of the consideration as exceeds £5,000, is such difference a special circumstance within the meaning of section 6 (*c*) which might justify the payment in cash of the whole or part of such excess; (*c*) whether the extent to which the market value of Transport Stock is below its nominal value is one of "the circumstances "of the case" within section 9 (1) (*a*); (*d*) where an undertaking is acquired from an owner who himself managed his own undertaking, is such an owner being compensated in accordance with the proper principles of law if the consideration is fixed without regard to the loss by him after acquisition of so much of the profits as, had he not been the owner would have represented a fair remuneration to him for

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

his services as manager; (*e*) was there evidence upon which the tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board; (*f*) whether the method of determining the consideration payable for transferred undertakings pursued by the Tribunal, was correct, or whether the Tribunal should determine the consideration payable on the basis of the value of the transferred undertaking as a going concern as between a willing seller and a willing purchaser.

Held, by the Court of Appeal (Andrews, L.J., Best, L.J., and Brown, J.):—(*a*) that nothing in either section 4 or section 5 of the Government of Ireland Act, 1920, renders invalid the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, in reference to payment of compensation in stock, and that such provisions are *intra vires* the Parliament of Northern Ireland; (*b*) that the difference between the market value and the nominal value of the stock is a "special circumstance" within the meaning of section 6 (*c*); (*c*) that the extent to which the market value of Transport Stock is below its nominal value may be regarded as a circumstance of the case within section 9 (1) (*a*) though when properly open for consideration by the Tribunal under section 6 (*d*) the Tribunal should deal with the question as a special circumstance under that section rather than as a "circumstance of the case" under section 9 (*a*); (*d*) that in a manager-owner business there must be some expense of management, and it is the duty of the Tribunal in assessing compensation for loss of goodwill in such a case to make a deduction from profits in respect of management expenses, of such a reasonable sum as upon the evidence and in all the circumstances of the particular case would constitute a fair remuneration for the owner's management of the undertaking; (*e*) that there was evidence upon which the Tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board; (*f*) that it would be wrong to value a transferred undertaking compulsorily acquired under the Act as if it were being sold by a willing seller to a willing purchaser, and that the owner is entitled to be compensated on the basis of the value of the undertaking to him, and not upon what its value may be to the purchaser.

SPECIAL CASE STATED for the opinion of the Supreme Court of Judicature in Northern Ireland under section 7 of the Road and Railway Transport Act (Northern Ireland), 1935, by the Arbitration Tribunal appointed under the Act aforesaid.

The case is stated subject to the validity of the appointment of the said Tribunal and the powers and duties purported to be imposed under the said Act on the Tribunal.

The facts which were deposed to on the hearing of the matter in respect of which the Tribunal by order of the Right Honourable Mr. Justice Brown, dated the 16th day of June, 1935, was ordered to state a case for the opinion of the Court are set out in an affidavit made by the members of the Tribunal filed in the said matter on the 19th day of February, 1937, and in the exhibits therein referred to.

The Tribunal agreed, on the application of counsel for the claimant, to state a case for the opinion of the Court upon the following questions :—

Question No. 1. Whether, assuming first that the provisions of section 6 (*c*) of the Act of 1935 in regard to the issue of transport stock are valid, and assuming secondly that the Tribunal is not entitled in determining the consideration to be paid by the Board to the owner of any road transport undertaking acquired by the Board to have regard to the difference between the market value and the nominal value of the stock that the Board would issue under the said section 6 (*c*) in respect of so much of the consideration as exceeds five thousand pounds, is such difference a special circumstance within the meaning of the said section 6 (*c*) which may justify the payment in cash of the whole or part of such excess.

Question No. 2. Whether, assuming first that the provisions of section 6 (*c*) of the Act of 1935 in regard to the issue of transport stock are valid, and assuming secondly that no special circumstances exist within the meaning of that section which justify the whole or any part of the excess over five thousand pounds of the consideration determined by the Tribunal being paid in cash, is the extent to which the market value of transport stock is below its nominal value one of the circumstances of the case to which the Tribunal, in determining the consideration to be paid by the Board to the owner of a road motor undertaking acquired by the Board, are bound to have regard under the provisions of section 9 (1) (*a*) of the Act of 1935, in view of the provision of section 6 (*c*) that the owner is only to receive, in respect of the excess of his consideration over five thousand pounds, stock of nominal value equal to the sterling value of such excess.

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

Question No. 3. Where a road motor undertaking is acquired by the Board from an owner who has himself managed his own undertaking, is such an owner being compensated in accordance with the proper principles of law, if the consideration is fixed without regard to the loss by the owner after acquisition, of so much of the profits of his undertaking as had he not been the owner would have represented a fair remuneration to him for his services as manager.

At the said hearing the claimant also applied to the Tribunal for a case stated upon the question following :

Question No. 4. Whether, in view of the provisions of section 5 (1) of the Government of Ireland Act, 1920, providing that the Parliament of Northern Ireland shall not make a law so as either directly or indirectly to take any property without compensation, the provisions of section 6 (*c*) of the Road and Railway Transport Act (Northern Ireland), 1935 (hereinafter called the Act of 1935) are valid, which purport to authorise and require the Board not to pay in cash the whole of the consideration determined by the Tribunal as due to the owners of road motor undertakings acquired by the Board, but in lieu of cash to issue to such owners transport stock of a nominal value equal to so much of the consideration as exceeds five thousand pounds, unless special circumstances exist which justify the whole or any part of the said excess being paid in cash.

The Tribunal refused to state a case upon this question as it was of opinion that—

(*a*) It would have been improper for the Tribunal to question the validity of the provisions of the Act by virtue of which it had been constituted and which it had been appointed to administer ; and

(*b*) As the claimant had presented his claim under the Act thereby submitting to the jurisdiction of the Tribunal and had tendered all his evidence, he should not be allowed in these proceedings to raise this point of which he was fully aware when he put in his claim and which if it were to be decided in the affirmative would abrogate the said Act of Parliament and render the concluded hearing totally abortive.

At the said hearing the claimant also applied to the Tribunal to state a special case upon the following question :—

Question No. 5. Whether upon the evidence adduced by the claimant there was evidence upon which the Tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board.

The Tribunal refused to state a case upon this question as it considered the form of the question to be inconsistent with the facts. The Tribunal had come to the conclusion that no loss by severance had been proved and refers to paragraph 17 of the affidavit before-mentioned.

By the said order of the Right Honourable Mr. Justice Brown the Tribunal was ordered to state a case upon all five questions and in obedience to the said order and pursuant thereto the Tribunal submits the questions aforesaid to the Court.

The Tribunal was appointed under the said Act for the sole purpose of determining the consideration to be paid by the Road Transport Board for transferred undertakings in case of dispute and the amount thereof that should be paid in cash.

The Tribunal considered that if the provisions of the Act conferring such jurisdiction upon it were invalid the Tribunal had no power to discharge the functions imposed upon it by the Act.

The Tribunal under the provisions of section 7 sub-section 4 of the said Act on its own initiative submits to the Court as a special case the following questions of law and desires to have the said questions determined for its guidance :—

Question No. 6. If question No. 4 be answered in the negative—

(*a*) Is the Tribunal validly appointed ?

(*b*) If validly appointed, has the Tribunal power to discharge the powers and duties purported to be granted to it under said Act in any manner other than that set out in the said Act ?

(*c*) Is there any method in which the Tribunal

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

can discharge its functions by distinguishing the valid from the invalid ?

(*d*) Whether the whole scheme for awarding consideration under the Act fails ?

(*e*) Whether it is competent for the Tribunal to award consideration without determining what part of such consideration is to be paid in cash ?

Question No. 7. Whether the method of determining the consideration payable for transferred undertakings pursued hitherto by the Tribunal, based on the schemes exhibited in the affidavit aforesaid is correct, or whether the Tribunal should determine the consideration payable on the basis of the value of the transferred undertaking as a going concern as between a willing seller and a willing purchaser ?

Question No. 8. Upon what basis should the consideration for transferred undertakings be determined by the Tribunal ?

The arguments sufficiently appear from the judgment of Andrews, L.J.

Black, K.C., Warnock, K.C. and *J. D. Chambers* for the claimant :—

John McGonigal, K.C., E. S. Murphy, K.C., and *Curran* for the Northern Ireland Road Transport Board :—

The Attorney-General (*Sir Anthony B. Babington, K.C.*) and *B. Maginess* for the Road Transport Arbitration Tribunal.

Sir Anthony B. Babington, K.C., also appeared in his capacity as Attorney-General.

Cur. adv. vult.

ANDREWS, L.J.

Nov., 30.

ANDREWS, L.J., delivered the judgment of the Court which was as follows :—

This matter came before us in the form of a special case stated for the opinion of the Supreme Court under section 7 (4) of the Road and Railway Transport Act (Northern Ireland), 1935, by the Arbitration Tribunal appointed under that Act. Certain of the questions contained in the case were submitted at the request of counsel for the claimant, John H. O'Neill, others

pursuant to the order of Mr. Justice Brown, dated 16th July, 1937, and the remainder at the instance of the Tribunal. The resulting grouping of the questions places them in a somewhat unnatural sequence, and this must be our justification for considering them in a different order from that in which they appear in the case.

A few introductory facts must be mentioned. In the year 1925 the claimant, who resides at Bangor, in the County of Down, commenced the business of a road motor undertaking for passenger transport. Subsequently he engaged also in the business of a funeral undertaker and taxi proprietor. All these businesses were still being carried on by him when the Road and Railway Transport Act (Northern Ireland), 1935, received the Royal Assent on 16th July, 1935. The principal object of that Act was to provide for the establishment of a Road Transport Board for Northern Ireland, and for the transfer to that Board of various road transport undertakings and interests. As appears by section 4 of the Act the legislature had in view the provision of a system of transport in Northern Ireland which would be properly co-ordinated and would give efficient, economical and convenient transport services to the public. The procedure for the transfer of transport undertakings to the Board is prescribed by section 5 of the Act ; and, in compliance therewith, a notice, dated 2nd November, 1935, was directed to and duly served upon the claimant intimating the Board's intention to acquire under the provisions of the Act his road motor undertaking operated for hire or reward in Northern Ireland, such undertaking to be transferred to and to vest in the Board on 3rd December, 1935. The claimant's businesses of taxi proprietor and funeral undertaker were excluded from the scope of the Act by the provisions of section 15 (4) (*a*) and (*g*), and the notice, accordingly, only affected his road motor undertaking, popularly known as the " bus " business. In due course the prescribed vesting order was made ; and, after negotiations for a settlement between the claimant's accountants, Messrs. Baird & Co., and the Board's accountants had failed, the

C.A. 1937.

O'Neill v. The Northern Ireland Road Transport Board.

Andrews, L.J.

claimant gave notice to the Board requiring his claim to be heard by the Arbitration Tribunal set up under the Act. Schemes for the compensation payable to the claimant were duly lodged by the Board and the claimant respectively in accordance with the provisions of the Act, and the Rules made thereunder. The offer of the Board contained in their scheme amounted to £22,355. Of this sum £6,905 represented the consideration for physical assets, payable as to £5,000 in cash and as to the balance of £1,905 in Transport A1 Stock, whilst the remaining £15,450 represented the consideration for goodwill, which it was proposed to discharge by the issuing to the claimant of Transport "B" Stock of the nominal value of £15,450. On the other hand, the consideration demanded by the claimant amounted to £45,026, approximately twice the amount of the offer, of which £9,916 represented physical assets, whilst the claim for severance accounted for £1,550, and goodwill for the balance of £33,560. Nothing was stated in the claimant's scheme in regard to the proposed method of payment. On 30th November, 1936, the claimant's solicitor wrote to the secretary of the Tribunal stating that the claimant was unable to accept the offer of £22,355, and that he, accordingly, requested, in pursuance of Regulation No. 2 of the Road Transport Arbitration Regulations, 1936, that the amount of consideration to be paid by the Board to him should be determined by the Arbitration Tribunal in accordance with the provisions of the Act.

The arbitration was, accordingly, held in the month of January last, when various submissions of considerable legal interest and of great public importance were made on behalf of the respective parties.

It is mainly upon these submissions that the several questions have been framed which are now submitted for the opinion of this Court. They arise mainly from the method prescribed by section 6 (*c*) of the Act for payment of the amount of the consideration or compensation for transferred undertakings where the amount thereof exceeds £5,000. In such case the sub-section provides that "the Board shall issue to

" the owners transport stock of a nominal value equal " to so much of the consideration as exceeds £5,000, " unless special circumstances exist which justify the " whole or any part of the said excess being paid in " cash." This transport stock is more particularly referred to in section 19 of the Act, by which it is provided that for the purpose of enabling the Board (*inter alia*) to satisfy the consideration to be given by them for the transfer to them of undertakings under the Act, the Board may create stock to be called " Northern Ireland Transport Stock," consisting of two classes, namely " A " stock and " B " stock, ranking in such order of priority (section 19 (4)). By section 19 (3) the amount of " A " stock outstanding at any time shall not exceed the total amount of the consideration for the transfer of undertakings to the Board in so far as such consideration represents assets exclusive of goodwill. By sub-section (6) the " A " stock bears interest at the rate of 4 per cent. per annum ; whilst by sub-section (7) the " B " stock bears interest at a rate not exceeding 4 per cent. per annum for the first two years, 5 per cent. per annum in respect of each subsequent year, with an additional contingent one per cent. per annum after the first three years. A further sub-division of the " A " stock into " A.1 " and " A.2 " is effected by the Second Schedule to the Act, the former being issued to satisfy the consideration for tangible assets of a profit-earning undertaking, the latter such assets of a non-profit-earning undertaking.

The priority of the " A " stock, coupled with its fixed rate of interest, has apparently resulted in its retaining approximately its par value, and, accordingly, no objection has been raised in regard to the payment of any portion of the compensation for transferred undertakings with this class of stock. On the other hand, the puisne character of the " B " stock, with its maximum but no minimum rate of interest, and the inferior rights conferred by section 22 upon holders in regard to the appointment of a receiver, had caused it to fall in market value to the price of between £78 and £82 at the time of the arbitration ; and we are told that it has since suffered further

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

depreciation. If, however, for the purpose of the present case this "B" stock be taken at the price of £80 for £100 of stock nominal value the payment of the sum offered by the Board for goodwill (£15,450) in this form of stock would occasion a loss to the claimant of £3,090, with proportionate heavier loss in the event of increased compensation being awarded by the Tribunal. Such a loss would be not only a serious matter for the present claimant, but it would involve a principle which would affect numerous other claimants whose compensation has not yet been determined; and the important legal issues which it raises for our decision, and which were so admirably argued before us, are worthy of and have received our most careful consideration.

The first of these issues, both in importance and in logical sequence, is raised in Question No. 4. Briefly expressed, it is whether, in view of section 5 (1) of the Government of Ireland Act, 1920, the provisions of section 6 (*c*) of the Transport Act, 1935, which, as above mentioned, provide for part payment in stock, are or are not valid. This section 5 (1) of the Act of 1920 is, indeed, most unhappily drawn. Its main purport was obviously to prohibit the making of any law by the Parliaments of either Southern Ireland or Northern Ireland which, to quote the words of the marginal note, would interfere with religious equality. Neither Parliament is permitted to make a law so as directly or indirectly to establish or endow any religion, or give a preference on account of religious belief, or make any religious belief or religious ceremony a condition of the validity of any marriage, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at that school, or alter the constitution of any religious body except as therein stated. The legislative prohibition continues in the following words, which from their importance we set out *in extenso* :—

> "or divert from any religious denomination the "fabric of cathedral churches, or, except for the "purpose of roads, railways, lighting, water or "drainage works, or other works of public utility

"upon payment of compensation, any other property, "or take any property without compensation." The sub-section concludes with an enactment that any law made in contravention of such restrictions shall be void.

The question which arises is as to the application and the meaning of the words "or take any property "without compensation." Are they words of restricted or of general application? Is the "property" to which they refer the property of a religious body or denomination only? Or does it relate to any property to whomsoever it may belong? On the one hand, it was submitted on behalf of the Board, and supported by the learned Attorney-General (who appeared on behalf of the Tribunal and also on his own behalf by our amendment made to enable him the more properly to argue the constitutional question) that the "property" referred to must be construed as property of a religious denomination; that it would be quite wrong as a matter of legal construction to assign a meaning of general import to these words contained, as they are, in the concluding line of a long section, the rest of which relates exclusively to property of a religious body or of a religious denomination. The Attorney-General submits that it would be a strange setting in which to find words of such general import. This view derives some support also from the fact that sub-section 2 of the same section has as its subject matter any disability imposed on account of religious belief. On the other hand, it is urged with great force on behalf of the claimant that the evil against which the legislation was directed, namely, the possible total or partial confiscation of property, was not by any means confined to the property of religious bodies, though such property naturally claimed and received special consideration at the hands of the Parliamentary draftsman. The words "any property," it is said, construed according to their natural meaning, have a perfectly general application to all classes of property. Why, then, should that application be restricted when it would have been such a simple matter to give them that restricted meaning by inserting the words "of

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

"any religious denomination" after the word "property," or by merely introducing the word "such" before the word "property" so as clearly to relate back the subject matter to that which had been previously mentioned? Why, upon principle, it is asked, should the rights of property of religious bodies be protected, and those of individuals be ignored? Reference was also made to the marginal note; but we fully appreciate the oft-repeated reluctance shown by the Courts to rely upon such notes in the construction of statutes. We were all, however, much impressed by the argument addressed to us by Mr. Black in his reply when he referred to section 64 (1) of the Act, in which like protection is afforded, in language similar to that of section 5 (1), to the property of the University of Dublin, or Trinity College, Dublin, and also to Queen's University of Belfast; but there is this clear distinction between the sections that section 64 (1) does not contain the concluding words "or take "any property without compensation." Why, he asks, were those words deemed necessary in one section and not in the other unless they were intended to have a wider application?

On the whole we feel that the balance of the weight of argument is in favour of assigning to the words their literal and wider meaning, holding that the Parliament of the United Kingdom in its wisdom deemed it expedient, when delegating certain of its legislative powers, to provide against the confiscation of any kind of property in Ireland, of which under local legislatures there was always at least a possibility in a country where religious differences were not the only cause of personal and class animosities.

Another wholly independent circumstance which impels us to the same conclusion is the judgment of this Court in *Robb v. Electricity Board for Northern Ireland* (1). In that case section 5 (1) of the Government of Ireland Act, 1920, was *assumed* by both sides and, accordingly, by both Megaw, J. and the members of this Court, to provide, as is stated in the head note, that the Parliament of Northern Ireland

(1) [1937] N.I. 103.

shall not make a law so as directly or indirectly to take any property without compensation. The narrower construction now sought to be put upon the section would have been as helpful to the Electricity Board in that case as it would be to the Transport Board in the present matter; but, although, as we are reminded by Mr. McGonigal, the Lord Chief Justice at an early stage of the argument in Robb's case threw out the suggestion of such a possible narrower construction, the suggestion was not accepted by the eminent counsel who appeared for the Electricity Board and received no support in argument. Whilst this Court is, of course, not bound by a construction of an Act of Parliament accepted by the parties and assumed without argument by the Court, yet the facts which I have mentioned are a circumstance which cannot be wholly ignored by this Court in the present case. There can be no greater danger in the administration of the law than inconsistency and uncertainty.

Holding, then, as we do, that the Parliament of Northern Ireland could not authorise property to be taken without compensation, we are next confronted with the problem of what is compensation. We are clearly of opinion that it does not necessarily imply compensation in money. The Lands Clauses Consolidation Act, 1845, sections 6 and 38, and the Conveyancing Act, 1881, section 14, are merely illustrations of how Parliament has made provision for the payment of "consideration in money" or compensasation in money when it is so intended. In the absence of any such qualifying words in section 5 of the Government of Ireland Act, 1920, it was in our opinion within the competency of the Parliament of Northern Ireland to provide for payment of compensation under the Transport Act, 1935, otherwise than in money. Such a right seems to have been the generally accepted view of the Parliament of Northern Ireland in prior enactments, clause 11 of the Schedule to the Roads Improvement Act (Northern Ireland), 1928, and section 9 (3) and (4) of the Drainage Act (Northern Ireland), 1929, providing illustrations of matters other than mere pecuniary payments which it is competent

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

for the arbitrator who assesses compensation to take into consideration.

It is attempted further by the claimant to establish the invalidity of the provisions of the Act of 1935 relating to payment in stock by reference to section 4 (12) of the Government of Ireland Act, which deprives the Parliament of Northern Ireland of any power to legislate in respect of coinage or legal tender. It is argued that by authorising payment of compensation in stock Parliament transgressed the provisions of section 6 of the Coinage Act, 1870; but in our opinion this is not so, as that section refers only to transactions relating to money or involving the payment of money, which, as we have already held, is not required by the provisions of section 5 of the Government of Ireland Act. The provisions of the Act of 1935 do not in our opinion constitute an attempt to establish any new currency medium.

For these reasons we are of opinion that nothing in either section 4 or section 5 of the Government of Ireland Act, 1920, renders invalid the provisions of the Transport Act, 1935, in reference to payment of composition in stock. Such provisions are *intra vires* the Parliament of Northern Ireland. The answer to Question 4 will, therefore, be in the affirmative.

Question 1 raises an issue which, in view of our answer to Question 4, is of vital importance to the owners of all transferred undertakings who are entitled to receive more than £5,000 compensation. By section 6 (*c*) of the Act of 1935 it is provided, as already mentioned, that where the amount of the consideration exceeds £5,000 the Board shall issue to the owners transport stock of a nominal value equal to so much of the consideration as exceeds £5,000; but there then follows the important qualifying words:—"Unless "special circumstances exist which justify the whole "or any part of the said excess being paid in cash." For the claimant it is submitted that the difference between the market value and the nominal value of the stock is a "special circumstance" within this sub-section, a contention strongly controverted by counsel for the Board, who contend that a "special

" circumstance " must be a circumstance special to one particular case or to two or more cases containing some special common feature. We have no hesitation in holding with the claimant on this point. The character of a " special circumstance " within the section is defined for us by the concluding words that it is such as justifies the whole or any part of the excess being paid in cash. We are unable to conceive any circumstance more relevant to such an issue than the fact that the market value of the stock stands at a substantial discount, rendering it inequitable that it should be treated as a medium of payment. We are satisfied that this proviso (to which there is no corresponding provision in The London Passenger Transport Act, 1933) was introduced into the section in order to ensure justice as between the owners and the Board. Such a clause was intended to protect the owners on a depreciated market, just as it might have been availed of to protect the Board if the stock had risen appreciably above its par value. Its object was to ensure the payment of true or real compensation—compensation which, whatever be the epithet we apply to it—reasonable, full or adequate—must be compensation commensurate with the loss sustained. The word " compensation " seems from its very derivation to connote the idea of its being reasonably equivalent to that which is taken or lost and for which it is substituted. Thus, in *Wharton's Law Lexicon* we find " compensation " defined as " making things equiva- " lent . . . ; also that equivalent in money which is " paid to the owners and occupiers of lands taken or " injuriously affected under the Lands Clauses Con- " solidation Act, 1845." Other standard works such as *The New Oxford Dictionary*, *Chambers' Dictionary*, and *Crabbs' English Synonyms* fully support this view —equality in value though not alike in kind. In our opinion compensation in this, its true sense, is not awarded by payment in stock which bears a market value of only 80 per cent.—it might be only 50 per cent. —of its nominal value. This would not accord with the principles of natural justice. We cannot impute to Parliament an intention to effect what would be

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

virtually a partial confiscation of the property of road transport undertakers which was being acquired from them—in many cases at least against their express wishes—under the compulsory powers conferred upon the Board by the Act.

We pass now to Question 2 which is very similar in character to Question 1 but arises on a different section —section 9 (1) (*a*)—of the Transport Act, 1935. This section provides rules for the guidance of the arbitration tribunal in determining compensation under the Act, the first of which is that "the tribunal shall have "regard to all the circumstances of the case." We are asked by the Tribunal to say in answer to this question whether the extent to which the market value of Transport Stock is below its nominal value is one of "the circumstances of the case" within the sub-section. Here, curiously as it may at first appear, the rival contentions are exactly opposed to those presented upon section 6 (*c*), Mr. Black, for the claimant, strenuously contending that such a matter, affecting payments only, was not a circumstance *of the case*, whilst counsel for the Board and for the Tribunal both support the contrary interpretation. Further, the Tribunal inform us in paragraphs 8 and 14 of their affidavit that in the case of *McNeilly v. Transport Board* (1), the only case which has been before them in which an award of stock was made—the depreciated value of the stock was regarded by them as one of the circumstances of the case under section 9 of the Act. They add that in the pending matter (O'Neill's case) they received evidence of the value of the stock, subject, strange as it may seem, to the objection of counsel for the Board.

In our opinion the Tribunal have not acted erroneously in regarding the depreciated value of the stock as a circumstance of the case within section 9 (1) (*a*); though we consider that, when the question is properly open for consideration by the Tribunal under section 6 (*c*) by virtue of the service of a proper notice under section 6 (*d*) invoking the jurisdiction of the tribunal to the issue of the amount of the consideration to be

(1) Unreported.

paid in cash, the tribunal should deal with it as a "special circumstance" under section 6 (*c*) rather than as a "circumstance of the case" under section 9 (*a*). In this way the element of speculation as to the possible value of the stock on the publication of the award is eliminated. We should, perhaps, add that, having regard to the course of the hearing in the present case, the jurisdiction of the tribunal to deal with the matter under section 6 (*c*) must be taken to have been properly sought and any informality in the notice waived.

The answer to Question 2 in the form in which it is put cannot be a definite "Yes" or "No"; but it appears to us that in the light of this judgment our opinion will be sufficiently clear if we answer "Yes, "in any case in which the total compensation has not "been paid in cash under section 6 (*c*)."

Question 3 is of an entirely different but none the less interesting character. Framed, as it is, on the requisition made on behalf of the claimant it is unfortunately extremely involved, and, as is apparent from the arguments addressed to us, it is not free from ambiguity. It would, accordingly, be dangerous to answer it with an unqualified "Yes" or "No." It relates to the vexed question of the proper basis of compensation where an undertaking has been taken over from an owner who was his own manager. In the present case the Board, apparently following their practice in other cases, have set out in paragraph 8 of their Scheme that from the average profit ascertained as therein mentioned there should be deducted a charge in respect of management by the proprietor. The amount of this charge appears in the statement annexed to the scheme at the figure of £200, which, on the basis of the suggested ten years' purchase of the basic figure of profits, reduces the compensation which would otherwise be payable by the substantial sum of £2,000. It is urged on behalf of the Board that unless some such deduction is made the award would compensate such owner-manager for his own services though his capacity to use them had not been taken away by the Act. On the other hand, for the

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

claimant, reliance is placed on the principles enunciated in such cases as *In re Lucas and Chesterfield Gas and Water Board* (1), *Cedars Rapids Manufacturing & Power Co. v. Lacoste* (2), and *Fraser v. City of Fraserville* (3), the effect of which, so far as material to the present case, is that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities. It is claimed that reasonable employment, especially in these days of uncertainty in the labour market, is an advantage, and, therefore, the subject of compensation, and, indeed, that ownership is a protection against unemployment. It is further pointed out with considerable force that if an owner-manager making £200 a year profits were to have the value of his services estimated, as by the Board in the present case, at the sum of £200, a grave injustice would result in his receiving no compensation for goodwill owing to the total elimination of his profits.

In our opinion, in a manager-owner business there must be some expense of management; and it is the duty of the tribunal in assessing compensation for loss of goodwill in such a case to make a deduction from profits in respect of management expenses, like any other business expense, of such a reasonable sum as upon the evidence and in all the circumstances of the particular case would constitute a fair remuneration for the owner's management of the undertaking. This, it should be clearly understood, does not necessarily mean the wage which would have to be paid for the work to an employee with fixed hours and defined duties in a whole-time occupation. An owner who can, as, for example, in the present case, manage other businesses either in conjunction with or independently of his road transport undertaking, can do the necessary management work of that undertaking at less expense to himself in his personal labour and time than he would incur by the employment of another and possibly a less satisfactory person as

(1) [1909] 1 K.B. 16, 29.
(2) [1914] A.C. 569, 576.
(3) [1917] A.C. 187, 194.

manager. We agree with Mr. Warnock that the quantum of compensation or of the deduction for the value of owner-manager services cannot be uniform, and that in this sense the personal equation must enter into the consideration of almost every case.

Question 5 relates to severance. Was there evidence upon which the tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board ? The form of the question implies, as Mr. Murphy expressly admits, that severance is a proper element for compensation when there is proper evidence to support it. In our opinion, although it is unfortunate that no evidence on the subject was given by the claimant, it cannot properly be said, as the tribunal appears to have held, that that circumstance is fatal to the claim. The evidence of Miss Monson, the bookkeeper, and of Mr. Baird, the accountant, was received without objection. In particular, we would refer to the evidence of Mr. Baird at pages 36 to 40 of the Transcript of Evidence. This deals with such topics as inability after severance to purchase petrol in bulk, additional expense of repairs, salaries and wages of employees, rent and rates, fuel and lights, bank charge and telephone. Mr. Baird explained how prior to the Board's acquisition of the road transport undertaking all such expenses were capable of being apportioned as between the businesses, but that that was no longer possible. Annex F. of Mr. O'Neill's scheme of compensation, upon which Mr. Baird based his evidence, contains particulars in figures of the claim, purporting to show an annual loss of £155 and a consequent claim for compensation in respect thereof of £1,550. We say nothing whatever about the weight to be attached to this evidence as that is not a matter for our consideration ; but we are clearly of opinion that it *was* evidence which could not properly be ignored merely because it was given by an accountant who was naturally in a large measure dependent on information which he obtained from the claimant's books, and from

C.A. 1937.

O'NEILL v. THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.J.

enquiries which he made in the preparation of the claim. If, as is suggested, his evidence was all of a hearsay character, such an objection should have been made at the time, and, if upheld, the evidence should have been rejected. In fact it was the subject of much cross-examination instead of objection. In our opinion, accordingly, question 5 should be answered in the affirmative.

Question 6, submitted by the Tribunal of its own initiative, is based entirely upon question 4 being answered in the negative. As our answer to that question is in the affirmative, question 6 does not arise. Perhaps, however, it may be right to state in clear and unambiguous terms that nothing which has been brought to our notice in this case throws the slightest doubt upon our minds as regards the validity of the appointment of the arbitration tribunal or of the stock issued under the Act.

In regard to Question 7, which is directed to the proper basis of compensation, we are clearly of opinion that it would be quite wrong to value a transferred undertaking compulsorily acquired under the Act as if in fact if were being sold by a willing seller to a willing purchaser. The owner is, in our opinion, entitled to be compensated on the basis of the value of the undertaking to him, and not upon what its value may be to the purchaser. This is only justice and equity. For example, the owner of a road transport undertaking might possess a lorry of a size and of a carrying capacity eminently suited for his requirements but which might be of little or no service to the Board. It would be confiscation, not compensation, if such lorry were to be compulsorily acquired from the owner on, say, a scrap basis, or without giving to him its reasonable equivalent in compensation, i.e., what it was worth to him. Subject to these observations and to any other matters mentioned in this judgment, we wish to express our general approval of the method of determining the consideration payable for transferred undertakings based on exhibited schemes hitherto pursued by the Tribunal.

At the same time we wish to express our clear

opinion that, in voluntarily submitting to compensation for goodwill on the basis of ten years' purchase of profits as compared with the five years' purchase provided for in the Eighth Schedule, Part II, of The London Passenger Transport Act, 1933, the Transport Board of Northern Ireland have acted with very great generosity to the owners of transferred undertakings.

Question 8 invites our opinion as to the basis upon which the consideration for transferred undertakings should be determined by the tribunal. No separate arguments were addressed to us upon this question, and we are not sure if we appreciate the difference between this question and question 7. In any event, we feel that it might be very dangerous for us to make any further general observations upon matters not argued by counsel and which might not, indeed, be wholly relevant to the facts of the present claim. We trust, however, that the views already expressed in this judgment will provide all the assistance required by the tribunal.

After careful consideration we are of opinion that the costs of the claimant and of the tribunal in connection with this case stated should be paid by the Transport Board.

Solicitor for the claimant : *J. Morris McKee.*

Solicitor for the Northern Ireland Road Transport Board : *J. Dunville Coates.*

Solicitors for the Road Transport Arbitration Tribunal : *J. C. Taylor & Co.*

J. McC.

K.B.D.
1937.

FERGUSON v. FERGUSON (1).

Dec. 10.

Insurance (Motor)—Accident—Happening of accident in front of owner's residence and away from public highway and while driver had alighted from car for temporary purpose—Liability in respect of which no obligation to insure imposed by statute—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, c. 15), *section* 18.

A voluntary passenger was injured in an accident in a private motor car. The driver of the car had arranged to drive his mother, the voluntary passenger. The driver brought the car to the front door of his mother's house, away from the public road. He then alighted and left the car for some temporary purpose. In the meantime the passenger got into the car. There was a slight fall in the ground and as the hand brake had not been effectively applied, the car moved down the incline. The passenger became alarmed and jumped out and fractured her ankle and received other injuries.

The passenger's husband and father of the driver held a private motor car insurance policy.

The insurance policy covered liability to passengers for accidents, and there was an endorsement on the policy extending the cover to accidents while the car was in the charge of the insurer's son, the driver of the car.

The voluntary passenger sued her son, the driver of the car, for damages. No defence was entered in the action. Interlocutory judgment was marked, and a sheriff's jury fixed damages at £25 with costs amounting to £38 15*s.* 5*d.* The insurance company repudiated liability.

The voluntary passenger, the plaintiff in this action, applied for an order under section 18 (1) of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, against the insurance company for payment of the amount payable under the judgment she had obtained.

Held, by Brown, J., (*a*) that the policy was wide enough to cover the accident; (*b*) that the son was in charge for the purpose of driving the car. The motion was accordingly granted.

MOTION for an Order under section 18 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, directing the National Farmers' Union Mutual Insurance Society, Limited, to pay to the plaintiff,

(1) In the King's Bench Division before Brown, J.

Letitia Ferguson, the sum of £25 for damages and £38 8*s.* 5*d.* for costs, making a total sum of £63 8*s.* 5*d.*, payable by the defendant, John Ferguson, under a judgment of the King's Bench Division, and which the plaintiff had not recovered.

The action was brought by the plaintiff against her son, the defendant, to recover damages for personal injuries which she sustained by reason of his negligence in the control and management of a motor car on 24th January, 1937.

At the time of the accident in which the plaintiff sustained a fractured ankle and other injuries, the motor car was in charge of the plaintiff's son, the defendant John Ferguson, who had driven it up outside the house where his mother resided, for the purpose of driving her to church.

At the moment of the accident the defendant had left the car temporarily to attend to some other duties about his father's residence.

The car was the property of William Ferguson, the plaintiff's husband, and at the time of the accident a policy of insurance issued by the National Farmers' Union Mutual Insurance Society, Limited, to him was in force.

The insurance policy covered not only the driving of the motor car by William Ferguson, but also covered any liability arising while it was in the charge, for the purpose of being driven, of the defendant John Ferguson, and indemnified him against all sums, including claims, costs and expenses which might become payable in respect of bodily injury to any person, including passengers, except injury arising out of and in the course of the employment of such person by William Ferguson.

The voluntary passenger, Letitia Ferguson, sued her son, John Ferguson, the driver of the car for damages. No defence was entered in the action. Interlocutory judgment was marked and a sheriff's jury fixed damages at £25 with costs amounting to £38 8*s.* 5*d.*

J. D. Condy, in support of the motion :—

K.B.D. 1937.

FERGUSON v. FERGUSON.

This application is brought under section 18 of the Motor Vehicles and Road Traffic Act, 1934, which deals with the remedies of third persons against insurers, where judgment has been obtained, and the amount of judgment has not been recovered.

Section 6 (1) of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, provides that users of motor cars must be insured against third party risks. Such a policy need not cover passengers, but I submit that a policy of insurance does not cease to be a policy under the Act because it covers more than is obliged to be covered. This application complies with all the requirements of section 18 of The Motor Vehicles and Road Traffic Act, 1934.

I rely on *The Royal Victoria Hospital v. The London Guarantee and Accident Corporation, Ltd.* (1).

The Attorney-General (*E. S. Murphy, K.C.*) (with him *J. D. Chambers*), for The National Farmers' Mutual Insurance Society, Limited :—

We submit that section 18 (1) of The Motor Vehicles and Road Traffic Act, 1934, does not apply to the present case. Such an accident was not within the contemplation of the insurers. The Court is entitled to look at all the facts of the case. The defendant was not driving the car at the time of the accident.

[BROWN, J. : The endorsement on the policy states that the policy covers accidents while the car is in charge of the defendant. Was the defendant not in charge of the car within the meaning of the Act, in the same way as a man might leave his car for a few moments to get water to refill the radiator ? He would still be driving the car.]

There is a marked distinction between that instance and that of a man who left a car outside his front door. The accident did not happen on a public highway. We submit that this car was not being driven by anyone and it was certainly not being driven on the public highway.

The liability is created by statute and not under the terms of the policy.

(1) [1937] N.I. 64.

We rely on the fact that section 18 created a new statutory remedy outside the terms of the policy. That special remedy is limited. The decision of the Court should be based on the provisions of the statute rather than on the terms of the policy. The statute aimed at the mischief of accidents occurring on the highway.

BROWN, J.

BROWN, J.: The matter that has given me some trouble was that the accident had not occurred on the public highway.

While section 6 (1) of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, provides that users of motor cars on a public highway should be insured against third party risks, the policy of the Acts went further and dealt with general insurance in relation to motor insurance. I think that the policy is wide enough to cover the accident in the present case.

It is true that section 18 (1) of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, provides that the Court may *if it thinks proper* grant applications under this section. But I consider that this is the case of a genuine accident, and that it is a proper case to grant the compensation sought.

The other point is, was the car being driven? It has been submitted on behalf of the respondents that the car was not being driven at the time of the accident.

On that point I hold that the defendant was in charge of the car for the purpose of driving it.

I think the motion should be granted, and I make an order for the payment of £63 8*s.* 5*d.* with a stay of execution until the second day of next term.

Solicitor for the applicant: *James Boston.*

Solicitor for the respondents: *J. Morris McKee.*

J. McC.

K.B.D.
(Probate)
1938.

IN THE GOODS OF ANNE ELIZA KERNAGHAN, DECEASED (1).

Jan. 28.
Feb. 4.

Wills—Admission to Probate—Wills of same date—No evidence of Priority of Execution—Slight Inconsistency.

Prima facie every testamentary document which has been duly executed ought to be admitted to probate; but if there are two testamentary documents of the same date, and it cannot be ascertained which of them was executed first, and if their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted and neither document will be admitted to probate, for the reason that, in so far as they are inconsistent with one another they are both void by the common law for uncertainty. The important question to be determined in such a case is whether the inconsistency is such that the two documents cannot stand together, and the Court will endeavour to reconcile differences rather than to look for inconsistencies.

A testatrix executed two wills, both dated the same day, their provisions being slightly inconsistent. The evidence of the attesting witnesses proved that on the day prior to the execution of the documents the testatrix declared that she was going to make a new will, and that on the day of execution she declared the two documents to be her will. Both documents were duly signed by the testatrix and attested, the one immediately after the other; but owing to the documents being covered up by the testatrix with a newspaper when they were being executed, the witnesses were unable to say which document was executed first.

The only material discrepancy between the two documents was that a legacy of £30 in one of them read £10 in the other. It was clear from examination of the document and from the evidence that the figures " 30 " were written on an erasure, and it was impossible to tell from the document what the original figures were.

Held, by Andrews, L.C.J., that neither will was intended to revoke nor did, in fact, revoke the other. Though not absolutely *facsimiles* they should be regarded as falling within the class of wills known as duplicates.

Owing to the slight variation in wording, and to the fact that neither could be said definitely to be the original, and the other only a copy, both documents should be admitted to probate, omitting the figures " 30 " from the second mentioned document, so that both might be available for the assistance of the Court, if any question of construction should arise.

(1) In the King's Bench Division (Probate) before Andrews, L.C.J.

APPLICATION for liberty to apply for and extract probate.

Anne Eliza Kernaghan, the testatrix, died on 29th December, 1937. On 6th January, 1933, she executed two paper writings, described in the proceedings as documents "A" and "B" Each of these documents opened with the words: "This is the last will and "testament of me, Anne Eliza Kernaghan," and each of them contained the usual revocation clause. Both documents were identical in all material respects, save one. All other differences were of a purely verbal character. Thus, for the words "if alive," in one document there were substituted the words "if still "living" in the other. For the word "for" in one document there appeared the word "to" in the other. The town of "Killylea" was described in one document but not in the other, as in County Armagh. There were about sixteen or seventeen verbal variations, not however, affecting the nature or objects of the gifts. The same persons, a breadserver, John Harris, and his wife, witnessed both documents. According to their testimony, on the day prior to the execution of the documents, the testatrix declared that "she was going "to make a new will," and on the day of execution she declared the two documents to be her will. Both documents were written on skeleton printed forms. They were duly signed by the testatrix and attested, the one immediately after the other; but owing to the documents being covered up by testatrix with a newspaper when they were being executed, the witnesses were unable to say which document was executed first. After execution, the testatrix took away both documents, stating that she would post "one copy" to her nephew, Hugh Armstrong, of Glasgow, and that she would keep "the other one" herself. She carried out this intention, document "A" being sent to the applicant, Hugh Armstrong, whom she had named in both documents as her executor, whilst document "B" was retained by the testatrix, being placed in an envelope in a box in her house. The envelope bore the following endorsement:—"The will of Anne Eliza "Kernaghan, widow, 75 Farnham Street, Belfast,

K.B.D. (Probate) 1938.

IN THE GOODS OF ANNE ELIZA KERNAGHAN, DECEASED.

"dated 6th January, 1933, to be opened after my "funeral by the clergyman attending my funeral. "A. E. K."

The one material discrepancy between the two documents is that a legacy of £10 to the testatrix's step-daughter, Maggie Tennant, in document "A" read £30 in document "B." It was clear that the figures "30" were written on an erasure and that it was impossible to tell from that document what the original figures were.

The erasure in document "B" was neither initialled nor was it referred to in the attestation clause.

McCorry for the applicant :—

I submit that the proper order is that the applicant may be at liberty to apply for and obtain probate of the paper writing marked "A." In that document a legacy of £10 was bequeathed to testatrix's step-daughter, Maggie Tennant.

Alternatively I ask for an order that both paper writings be admitted to probate, the alteration in the legacy to Maggie Tennant in the paper writing marked "B," being omitted.

[He referred to *Miller's Probate Practice*, page 158, section 21 of the Wills Act, 1837, Rules of the Supreme Court (Northern Ireland) Order 79, rule 10, and *In the Goods of Miller* (1).]

Cur. adv. vult.

ANDREWS, L.C.J.

Feb., 4.

ANDREWS, L.C.J.: The testatrix, Anne Eliza Kernaghan, died on 29th December, 1937. On 6th January, 1933, she executed two paper writings, which have been referred to in the affidavits and arguments as documents "A" and "B." Each of these documents opens with the words :—"This is the "last will and testament of me, Anne Eliza Kernaghan," and each of them contains the usual revocation clause. The documents are in all material respects, save one to which I shall later refer, identical with one another. Such differences as exist are of a purely verbal character. Thus, for the words "if alive" in one docu-

(1) [1931] I.R. 364.

ment there are substituted the words "if still living" in the other. For the preposition "for" in the one document we read "to" in the other. The town of "Killylea" is described in the one document, but not in the other, as in Co. Armagh. These are only illustrations of some sixteen or seventeen verbal variations, none of which appears to me to affect in the slightest degree the nature or objects of her gifts. The same persons—a breadserver, John Harris, and his wife—witnessed both documents. I accept their testimony that on the day prior to the execution of the documents the testatrix declared that "she was going to make "a new will," and that on the day of execution she declared the two documents to be her will. Both documents were written on skeleton printed forms. They were duly signed by the testatrix and attested, the one immediately after the other; but it is not surprising to find that, owing to the documents being covered up by the testatrix with a newspaper when they were being executed, the witnesses are quite unable to say which document was executed first. After execution the testatrix took away both documents, stating that she would post "one copy" to her nephew, Hugh Armstrong, of Glasgow, and that she would keep "the other one" herself. She carried out her intentions in this respect, document "A" being sent to the present applicant, Hugh Armstrong, whom she had named in both documents as her executor, whilst document "B" was retained by the testatrix, being placed in an envelope in a box in her house. The envelope bore the following endorsement:—

"The Will of Anne Eliza Kernaghan, widow, 75
"Farnham St., Belfast, dated 6th Jany., 1933, to be
"opened after my funeral by the clergyman attend-
"ing my funeral. A. E. K."

The one material discrepancy between the two documents to which I have referred is that a legacy of £10 to her step-daughter, Maggie Tennant, in document "A" reads £30 in document "B." It is, however, perfectly clear from my examination of the original and from the evidence before me that the figures "30" are written on an erasure, and that it is

K.B.D. (Probate) 1938.

IN THE GOODS OF ANNE ELIZA KERNAGHAN, DECEASED.

ANDREWS, L.C.J.

quite impossible to tell from that document what the original figures were.

In these circumstances Counsel for the applicant asks for an order that the applicant be at liberty to apply for and extract probate of the paper writing marked " A " as the true last will of the testatrix.

Now it is first to be noted that the erasure in document " B " is neither initialled nor is it referred to in the attestation clause. It cannot be proved to have existed in the will at the time of its execution ; neither was it duly executed or attested. It is not even established that it was made by the testatrix. In these circumstances the presumption of law, of course, is that the alteration was made after the execution of the will, *Cooper v. Bockett* (1); and, accordingly, if document " B " be admitted to probate, it must be without the figures " 30 " *Wills Act*, 1837, *sec.* 61, *and Or.* 79, *r.* 10.

The question, however, which has first to be determined is which document or documents, if any, should be admitted to probate. There are four possible answers :—(1) " A " ; (2) " B " ; (3) " A " and " B " ; or (4) Neither " A " nor " B." Several reported cases on the subject might be referred to, but in my opinion, the principles upon which the Courts act are to be found most clearly enunciated in *Townsend v. Moore* (2). In that case a testatrix executed two codicils practically simultaneously on the same day. The two codicils were by no means identical; indeed, their provisions were to some extent inconsistent. There was nothing to show which codicil was in fact executed first. The majority of the Court of Appeal held (*Cozens Hardy, L.J., dubitante*) that the provisions of the two codicils were not so inconsistent that they could not stand together, and that both ought to be admitted to probate. They regarded them as in fact duplicates, intended to be read together. The case clearly establishes that *prima facie* every testamentary document which has been duly executed ought to be admitted to probate ; but if there are two testamentary documents of the same date, and it cannot be

(1) 4 Moo. 419. (2) [1905] P. 66.

ascertained which of them was executed first, and if their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted and neither document will be admitted to probate, for the simple reason that, at least in so far as they are inconsistent with one another, they are both void by the common law for uncertainty. Thus it will be observed that the important question to be determined in such a case is whether the inconsistency, if any, is such that the two documents cannot stand together ; and it is in my opinion very apparent from the decision in *Townsend v. Moore* (1), and particularly from the judgment of Vaughan Williams, L.J., in that case, at p. 81, that the Court will endeavour to reconcile differences rather than to look for inconsistencies.

Now in that case there were undoubtedly important differences between the two documents—so important, indeed, that Cozens Hardy, L.J., said that to him it was almost incredible that the testatrix could have intended that both documents should be effective. It is, therefore, a much stronger case than the present in which the differences, with the exception of the erased and substituted legacy to Maggie Tennant, which I have presumed to be post-testamentary, are purely verbal and wholly immaterial. It would, in my opinion, be nothing short of a travesty of justice if in such a case the clear testamentary intentions of the testatrix were to be defeated by some supposed technical rule of law, with the result that her property would devolve in a manner which she did not intend as on an intestacy. In my opinion, neither principle nor authority compels such a conclusion. Mr. McCorry very properly called my attention to the decision of Hanna, J., in *In the Goods of Millar* (2), in which the learned judge refused to grant probate of either of two wills executed on the same day ; but the case establishes no new principle, and the decision turned entirely on the conclusion at which Hanna, J., arrived on the question of fact, namely, that the two wills were, in his opinion, " materially inconsistent and

(1) [1905] P. 66. (2) [1931] I.R. 364.

K.B.D. (Probate) 1938.

IN THE GOODS OF ANNE ELIZA KERNAGHAN, DECEASED.

ANDREWS, L.C.J.

"irreconcilable." Such a case cannot govern the present.

In my opinion, neither will was intended to revoke nor did, in fact, revoke the other. Though not absolutely *facsimiles* they should, in my opinion, be properly regarded as falling within the class of wills referred to as duplicates. Owing, however, to the slight variation in wording and to the fact that neither can be said definitely to be the original and the other only a copy, I am of opinion that the proper order to make is that both documents omitting the figures "30" from document "B" be admitted to probate, so that both may be available for the assistance of the Court, if, as is very improbable, any question of construction should arise.

The applicant must have his costs of the application as executor's costs out of the estate, such costs to include those incidental to the notice of the application which I directed should be served upon Maggie Tennant.

Solicitors for the applicant: *Edward Cooksey & Co.*

J. McC.

DOUGAN v. BELFAST CORPORATION (1).

High Court of Justice. 1937.

Jan. 21.

Damage caused to house by alteration by Municipal Corporation of street level causing dampness—Alteration making damp course and ventilator useless—Damp course and ventilator below level of footpath—8 & 9 Vic., c. 142—Power to alter level—Reasonable necessity—Continuing injury—Public Authorities Protection Act, 1893 (56 & 57 *Vict., c.* 61).

The plaintiff claimed for damages caused to his house by alteration in the street level.

In December, 1935, he discovered signs of damp in part of the gable. These signs first appeared above the skirting in the little scullery of the house, and the dampness gradually travelled up the wall and spread to the kitchen. The dampness only became apparent when it had travelled as far as the top of the skirting. The damp course and ventilator in the gable were found to be below the level of the footpath in the avenue where the plaintiff's house was situated. In such a position they could not prevent the spreading of damp to plaintiff's house.

It was established that the level of this avenue was raised by the works carried out by the defendants, the Corporation of B., in 1928—1929, that the damp which was complained of was caused gradually as a result of the alteration in level. This alteration buried the damp course and ventilator, making them useless to fulfil their purpose. This damp became manifest for the first time at the end of December, 1935.

Section 85 of the Local Act, 8 & 9 Vict., c. 142, empowered the Corporation of B. to alter the level of any street in such manner and form as the Council should think expedient.

Held, by Best, L.J., affirming the decree of the Deputy Recorder of B., that to justify the Council in making such alteration there must be some reasonable necessity for doing so, the Corporation could not arbitrarily raise or lower the level of streets ; that the Corporation had failed to show that the change of level was necessary or that it served any useful purpose, and that as such alteration caused damage to plaintiff's property, the plaintiff was entitled to succeed in his claim and that he was not barred by any provision in the Corporation Acts ; that as the injury first became apparent to the plaintiff in December, 1935, and the civil bill claiming damages was heard by the Deputy Recorder in May, 1936, the Public Authorities Protection Act, 1893, did not apply.

(1) In the High Court of Justice before Best, L.J.

High Court of Justice. 1937.

DOUGAN v. BELFAST CORPORATION.

APPEAL from a decision of the Deputy Recorder of Belfast giving judgment for the plaintiff in a civil bill brought, claiming damages caused by alterations in Allworthy Avenue, Belfast, which were carried out by the defendants, the Corporation of Belfast, in the winter of 1928-1929.

The plaintiff who resided in 236 Antrim Road, Belfast, purchased the leasehold interest in the house from a Mrs. Davidson, in 1934. The house fronted on Antrim Road, and had a gable abutting on Allworthy Avenue. The kitchen and scullery of the house were next to the Avenue, and in them there was a pitch pine skirting three feet high.

It was admitted on behalf of the defendants that the house was in exceptionally good order. It was also admitted that no records of alteration of levels of streets were kept by the Corporation, that the ventilator in the gable was found, on the ground being opened up, to be completely covered.

In December, 1935, the plaintiff discovered signs of damp in that part of the gable which was furthest away from Antrim Road. These signs first appeared above the skirting in the little scullery, and the dampness gradually travelled up the wall and spread to the kitchen. The plaintiff called in a builder who made an examination of the premises. As a result of this examination it appeared that the damp course and ventilator in the gable were below the level of the flags on the footpath in Allworthy Avenue. From their position they could serve no useful purpose in preventing the intrusion of damp to the house.

It was alleged on behalf of the plaintiff that the defendants carried out some alterations to Allworthy Avenue and footpath in the autumn and winter of 1928-1929.

The defendants did not deny that certain alterations were carried out at that time, but their witnesses stated that no alteration in the level of the Avenue or footpath was necessary, that none was intended and that none took place. On the other hand, a witness examined for the plaintiff stated that the level must have been raised whether it was intended so or not.

A witness for the plaintiff residing in a house immediately adjoining the back of plaintiff's house stated that she had resided in her house for fifteen years, that the cobble street in Allworthy Avenue was reconstructed by the defendants, that prior to this reconstruction there were two steps and a long slab, the depth of the latter being estimated by her at one and a half inches, between the level of the footpath and the level of the bottom of her front door entrance, and that since the reconstruction was carried out there had been two steps only and that one of them had been reduced by one and a half inches in depth.

Section 85 of the Local Act, 8 & 9 Vict., c. 142, provides "That it shall be lawful for the Council, at "the costs and charges of the Mayor, Aldermen and "Burgesses, at any time and from time to time to "alter the level of any street, sewer, or drain, now or "hereafter to be formed, laid out, or made within the "the limits of this Act, or the course, form or con-"struction of such sewer or drain, in such manner "and form as the Council shall think expedient."

The injury first became apparent to the plaintiff in December, 1935, and he complained to the defendants in February, 1936, the civil bill claiming damages being heard by the Deputy Recorder in May, 1936.

The Deputy Recorder granted a decree for £31 6*s.* 6*d.* in favour of the plaintiff, and the defendants appealed to the High Court.

E. S. Murphy, K.C., and *Fox* for the appellants :—

John McGonigal, K.C., and *Condy* for the respondent.

BEST, L.J.

BEST. L.J. : The claim in this case is for damages caused to the plaintiff's house by certain alterations to Allworthy Avenue carried out by the defendants in the winter of 1928-1929.

The plaintiff, who resides in 236 Antrim Road, purchased the leasehold interest in the house in question from Mrs. Davidson in 1934. The house fronts on Antrim Road and has a gable abutting on Allworthy

High Court of Justice. 1937.

DOUGAN v BELFAST CORPORATION.

BEST, L.J.

Avenue. The kitchen and scullery of the house are next to the Avenue and in them there is a pitch pine skirting three feet high.

Mr. Herbert McMurtry, superintendent of works for the defendants, admitted in cross-examination that the house is an exceptionally good house ; he also admitted that no records of alteration of levels of streets are kept by the Corporation, that the ventilator in the gable was found, on the ground being opened up, to be completely covered, and that only a madman would put a ventilator below the level of the street.

In December, 1935, plaintiff discovered signs of damp in that part of the gable which is furthest away from Antrim Road. These signs first appeared above the skirting in the little scullery, and the dampness gradually travelled up the wall and spread to the kitchen, and, as I understand the evidence, the dampness only became apparent when it had travelled as far as the top of the skirting. The plaintiff called in Mr. Hill, a builder, who made an examination of the premises, from which it appeared that the damp course and ventilator in the gable were found to be below the level of the flags on the footpath in Allworthy Avenue, and that from their position they could serve no useful purpose whatever in preventing the incursion of damp to plaintiff's house.

For plaintiff it is alleged that the defendants carried out some alterations to Allworthy Avenue and footpath in the autumn and winter of 1928-1929.

That certain alterations were then carried out is not denied by the defendants, but their witnesses, one and all, say that no alteration in the level of the Avenue or footpaths was necessary, that none was intended, and that none took place. On the other hand, Mr. Redmond Taggart, who was examined for the plaintiff, is positive that the level of the Avenue must have been raised whether it was so intended or not.

Miss Sarah Donnelly, of No. 2 Allworthy Avenue, whose house immediately adjoins the back of plaintiff's house, told me in evidence that she had resided in this house for fifteen years, that the cobble street in

Allworthy Avenue was reconstructed by the defendants, that prior to this reconstruction there were two steps and a long slab, the depth of the latter being estimated by her at one and a half inches, between the level of the footpath and the level of the bottom of her front door entrance, that since the reconstruction was carried out there have been two steps only and that one of these has been reduced by one and a half inches in depth.

Whether the measurements given by this witness are correct or not, I am satisfied that she is telling the truth when she says that the level of the street and footpath in Allworthy Avenue was raised after the reconstruction carried out in 1928-1929.

There is a remarkable confirmation of that evidence from photographs which were taken after certain flags on the footpath in Allworthy Avenue had been lifted.

I have arrived at the conclusion and so find that the level of Allworthy Avenue was in fact raised by the works carried out by the defendants in 1928 and 1929, that the damp which is complained of was caused gradually as a result of the alteration in level, which alteration buried the damp course and ventilator, thereby making them useless to fulfil their purpose, and that the damp became manifest for the first time in the end of December, 1935.

The Corporation by virtue of section 85 of their Act, 8 and 9 Vict., c. 142, are empowered to alter the level of any street in such manner and form as the Council shall think expedient. In my opinion, however, to justify the Council in making such alteration there must be some reasonable necessity for doing so, and one of the tests of this reasonable necessity is that such alteration is done in the interests of the public; the Corporation cannot, in my opinion, arbitrarily raise or lower the levels of streets, there must be some reasonable or necessary purpose to be served thereby.

In any particular case it is the duty of the Council, if their action is challenged, to show what the reasonable purpose is. In the present case not only do the witnesses for the defendants maintain that in fact no alteration in level was effected, but one of them, Mr.

High Court of Justice. 1937.

DOUGAN v. BELFAST CORPORATION.

BEST, L.J.

McMurtry, as I have already stated, admits that no records of these alterations are kept, and it is thus impossible for the defendants to show, and they have in fact failed to show, that the change of level in Allworthy Avenue was necessary or that it served any useful purpose, and as such alteration of the level rendered useless the ventilator and the damp course in plaintiff's gable and thereby caused damage to his property, I have come to the conclusion that the defendants acted wrongfully towards the plaintiff's predecessor in title, and through her to the plaintiff, in acting as they did in 1928-1929, that the wrong then committed by the defendants was a continuing wrong, and that the plaintiff is entitled to succeed in his claim unless he is barred therefrom either by some provision in the Corporation Acts or by the Public Authorities Protection Act, 1893.

Mr. Murphy contended that, even if I found that the footpath has been raised, the plaintiff has no cause of action as he has taken the wrong remedy, and, as it was said that many similar cases would be governed by this decision, he asked me to state a case on the question of law that no action lies even in such circumstances.

Shortly after the civil bill appeal had been heard I intimated to counsel for each party that I intended to find the facts against the Corporation, and after some time I was informed that the Corporation no longer desired to have a case stated. I am accordingly called upon to decide this important matter without the help which I was led to expect I might have received from the Court of Appeal.

In my opinion the fact that no provision for compensation to a person who alleges that his property has been damaged by the alteration of the level of a street is contained in section 85 of the defendant's Act, 8 & 9 Vict., c. 142, cannot be successfully pleaded as a reason for refusing damages to the plaintiff in the present case. Section 85 presupposes that the alteration in the level of the streets is necessary and justifiable in the interests of the public and is properly authorised by the Corporation, and if these conditions are fulfilled then a member of the public whose property is injured

as a result of such alteration is without remedy.

On the other hand, if the servants of the Corporation, without being authorised to do so, choose to alter the level of a street where no necessity for such alteration exists, and if injury from such alteration ensues to an adjoining property owner, that owner is, in my opinion, not deprived of his common law remedy to claim damages for such injury.

As the injury first became apparent to the plaintiff in December, 1935, and as he complained to the defendants through his solicitors in February, 1936, and the civil bill claiming damages was heard by the Deputy Recorder in May, 1936, the Public Authorities Protection Act, 1893, has no application in the present case.

I accordingly affirm the decree for £31 6*s.* 6*d.* granted by the Deputy Recorder, and plaintiff must have his costs of the appeal and also a reasonable sum for witnesses' expenses.

Solicitor for the appellants: *John Archer.*

Solicitors for the respondent: *George McIldowie & Sons.*

J. McC.

C.A. 1937.

Nov. 11, 22.
Dec. 20.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS (1).

Dwelling house—Order to abate a nuisance—Payments on account of rent in arrear—Appellants in applying for rent in arrear and demanding and receiving rent in arrear acting as solicitors for owners—"Owners"—Agents—The Public Health (Ireland) Act, 1878 (41 & 42 *Vict., c.* 52), *section* 2.

On 20th July, 1936, a notice to abate a nuisance was served on the appellants, a firm of solicitors, as "owners" of certain premises consisting of a dwelling house, which had been in the occupation of a tenant.

On 25th November, 1936, a summons was served on the appellants as "owners" under section 2 of the Public Health Ireland Act, 1878. The condition of the premises was not improved.

On 21st January, 1937, the Resident Magistrate made an order convicting and fining the appellants and ordering them to abate the nuisance.

The appellants appealed to the Recorder of L.

The actual ownership of the premises lay in a number of persons, most of whom lived in America ; but it was admitted for the purpose of the hearing before the Recorder that the appellants, in applying for rent in arrear and demanding and receiving rent in arrear, were acting as solicitors for the owner in respect of such demand and receipt.

On 11th February, 1935, the appellants wrote to the tenant pointing out that he had only paid his rent up to 11th August last and that there was a considerable amount due by him. In this letter they said : "we think you should make an effort to pay up "this rent and we are prepared to receive the rent on behalf of "our client."

The Recorder found as a fact that at all material times the payments were received by the appellants in the ordinary course of their business as solicitors as payments on account of arrears of rent. He also found as a fact on the evidence that the appellants did not act as agents for the collection or receipt of current rent, but only as solicitors in the course of their business to enforce payment of rent which was in arrear. He held that the appellants were not owners within the meaning of the Public Health (Ireland) Act, 1878, and allowed the appeal.

(1) In the Court of Appeal before Andrews, L.C.J., Best, L.J. and Brown, J.

The Recorder, however, stated a case for the opinion of the Court of Appeal.

The question for the opinion of the Court was expressed by the Recorder in the following terms :—" Was I right in finding that " the appellants were merely solicitors enforcing payment of rent " in arrear and were not owners within the meaning of the Public " Health (Ireland) Act, 1878."

In response to a request of the Court of Appeal the Recorder forwarded an amended question which he asked should be substituted for the question as it appeared in the case stated. This amended question was as follows :—" Was I right in holding that " the appellants were not owners within the meaning of the Public " Health (Ireland) Act, 1878, having regard to my findings of fact " as above stated."

Held, by the Court of Appeal (Andrews, L.C.J., Best, L.J., and Brown, J.) that to constitute the appellants agents within the Public Health (Ireland) Act, 1878, section 2, they must be acting as agents duly appointed and duly authorised to collect rent including current rent, and not merely as solicitors authorised in the course of their business to collect a debt which consists of arrears of rent; and that, on his findings of fact, the Recorder was right in holding that the appellants were not " owners " within the meaning of the Public Health (Ireland) Act, 1878.

CASE STATED by the Recorder of Londonderry on the hearing of an appeal under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, for the opinion of the Court of Appeal on the point of law raised in the case stated.

This was an appeal from an order made by the resident magistrate, dated the 21st January, 1937, whereby the appellants were convicted and fined and ordered to abate a nuisance under the provisions of the Public Health (Ireland) Act, 1878.

On 25th November, 1936, the appellants were summoned under the Public Health (Ireland) Act, 1878, on the ground that certain premises at 16 Donegall Street, Rosemount, Londonderry, were in such a state as to be a nuisance or injurious to health. On the 21st January, 1937, the appellants were convicted under the said Act by the Court of petty sessions at Londonderry, and were ordered to carry out the works specified in the order of the Court to abate the nuisance on the said premises, and were ordered to pay a fine of one shilling and twenty shillings costs.

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

The appellants appealed against the said order, and the appeal came on for hearing before the Recorder at Londonderry quarter sessions on 30th September, 1937. The following facts were admitted or proved :—

The premises the subject matter of the appeal consisted of a dwelling house of which the occupying tenant was one Charles Hagan.

On the 20th July, 1936, a notice to abate an alleged nuisance was duly served by the sanitary officer for health of the city of Londonderry on the appellants.

On the said date the condition of the premises constituted a nuisance and was injurious to health.

The cause of the said condition was long neglect and failure to repair the premises over many years.

The said condition of the premises was not improved even after the service of the said notice. It was stated in Court on behalf of the appellants that to carry out the work required by this notice would cost a considerable sum.

On the 25th November, 1936, a summons was served on the appellants under the Public Health (Ireland) Act, 1878.

The appellants are solicitors practising in Londonderry, and the summons was served upon them as being the "Owner" of the premises within the meaning of the Public Health (Ireland) Act, 1878.

The premises were let to the tenant at a rent of 4*s.* 11*d.* per week which is the rack rent of the premises.

The actual ownership of the premises lies in a number of persons, most of them in America, but it was admitted for the purpose of the hearing that the appellants, at the date of the letter hereinafter referred to and on the dates of subsequent payments of arrears of rent, in applying for rent in arrear and demanding and receiving rent in arrear, were acting as solicitors for the owner in respect of said demand and receipt.

On the 11th February, 1935, the appellants wrote to the tenant in regard to the rent of the premises in the following terms :—

"We understand Mrs. Dalway has now definitely "given up the agency of your house which is held "under our client, Mr. Robert Hume. Your rent "has only been paid up to 11th August last and "there is a considerable sum now due by you. "We think you should make an effort to pay up "this rent and we are prepared to receive the rent "on behalf of our client."

After the date of this letter, but not before it, payments were received from the tenant by the appellants which payments were entered or credited in the rent book provided for the tenant by a former rent agent of the owner. Twelve payments in all were received by the appellants as follows :—

1935.	February	16	...	£1	9	6
	March	11	...	2	4	3
	June	24	...	0	12	0
	July	6	...	0	10	0
	September	9	...	1	0	0
	October	7	...	5	0	0
1936.	January	11	...	0	10	0
	,,	20	...	0	5	0
	May	9	...	0	7	6
	,,	19	...	0	7	6
	,,	29	...	0	7	6
	June	13	...	0	15	0

These payments were made in response to the said letter and, it was stated, also in response to subsequent letters from the appellants, demanding payment. Each payment left arrears due. At the date of the first the arrears exceeded £6. At the date of the last they exceeded £9.

The notice to abate and summons referred to was served on the appellants on the grounds that they were in receipt of the rack rent of the premises for the time being as agents and were accordingly owners of the premises within the Public Health (Ireland) Act, 1878, and that the said nuisance was caused by their act or default.

It was contended by the appellants (1) that the receipt by them of payments by the tenant was a receipt of payments on account of arrears of rent which they

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

were collecting in the course of their business as solicitors for the owner as a debt ; (2) that they were not collecting the current rent at any time and that they were not therefore in receipt for the time being of the rack rent of the premises ; (3) that they were not receiving the rent at the date of the notice ; and (4) that, in any event, the condition of the premises was of long standing and not due to any act or default of theirs since the date of the first payment.

On the evidence the Recorder found as a fact that, at all material times, the payments were received by the appellants in the ordinary course of their business as solicitors as payments on account of arrears of rent and that on the evidence the appellants did not act as agents for the collection or receipt of current rent, but only as solicitors in the course of their business to enforce payment of rent which was in arrear. So finding on the facts, the Recorder held that the appellants were not owners within the meaning of the Public Health (Ireland) Act, 1878, and accordingly allowed the appeal with costs.

The question is was the Recorder right in finding that the appellants were merely solicitors enforcing payment of rent in arrear and were not owners within the meaning of the Public Health (Ireland) Act, 1878.

A difference of opinion arose between counsel for the parties who argued the case in the Court of Appeal as to the meaning of the question in the case stated. The appellants contended that the only question for the Court was whether on the admissions and findings of fact they were "owners" of the premises within section 2 of the Public Health Act, 1878, whilst the respondents argued that the finding that the appellants were merely solicitors enforcing payment of rent in arrear was also in issue as a mixed question of law and fact.

The members of the Court of Appeal were of opinion that it was not possible for them to reply to the question in the case stated until they were satisfied as to its true meaning. They directed the Registrar of the Court to write to the Recorder the following letter :—

"I have been requested by the Court of Appeal "for Northern Ireland respectfully to direct your "attention to the form of the question which you "have submitted to them in this case stated, upon "the meaning of which there was considerable "difference of opinion amongst counsel who ad- "dressed the Court.

"The Court would be indebted to you if you would "kindly re-draft the question in such a form as "would remove any doubt as to its intended scope.

"Counsel for the appellants submitted that the "only question for the Court to determine is whether "on your findings the appellants are 'owners' "within the meaning of the Public Health (Ireland) "Act, 1878; whilst counsel for the respondents "submitted with equal confidence that it was also "your intention to obtain the opinion of the Court "upon whether you were right in holding on the "evidence that the appellants were merely solicitors "enforcing payment of rent in arrear. This, they "submitted, is a finding which you intended to be "open to review as being one of mixed law and "fact, depending, as it was contended, entirely upon "the proper construction to be placed upon the "appellants' letter of 11th February, 1935, and upon "the entries in the rent book.

"Your kind reply at your early convenience will "be much appreciated by the Court."

In reply to this letter the Recorder forwarded an amended question which he asked should be substituted for the question in the case stated. This question was in the following terms:—"The question "is, was I right in holding that the appellants were "not owners within the meaning of the Public Health "(Ireland) Act, 1878, having regard to my findings of "fact as above stated."

The Attorney-General (*E. S. Murphy, K.C.*), *William Lowry, K.C.*, and *Nicholson* for the Corporation of Londonderry:—

"Owner" is defined in section 2 of the Public Health (Ireland) Act, 1878, as meaning "the person

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

"for the time being receiving the rack rent of the lands "or premises in connection with which the word is "used, whether on his own account or as agent or "trustee for any other person, or who would so receive "the same if such lands or premises were let at a "rack rent."

The fact that rent is in arrear cannot take the case out of the section.

We submit that the principles of the decision in *Watts v. Battersea Borough Council* (1) apply to the present case, and that the present case is not distinguishable from that case. The mere fact that the whole rent was not paid does not differentiate the case, nor does the fact that the agent was a solicitor differentiate the case. Rent in arrear is still rent. The fact that rent is in arrear does not change the relationship of landlord and tenant. Where solicitors proceed to collect rent for premises they come *quà* those premises, within the definition of "owner" in section 2 of the Public Health (Ireland) Act, 1878. The facts in the present case are even stronger than in *Watts v. Battersea Borough Council* (1).

We rely on *The Mayor of St. Helens v. Kirkham* (2), and on *Broadbent v. Shepherd* (3).

The essential nature of the payment due cannot be changed by being called a debt.

The argument for the complainants in the present case is really based on the decision in *Watts v. Battersea Borough Council* (1), that case is really a precise authority on the point at issue.

A decision based on written documents is a finding of law in regard to which an appellate court is entitled to come to a contrary conclusion.

It is reasonably clear that the Recorder based his decision on the fact that the defendants were receiving only rent in arrear.

The decision in *Watts v. Battersea Borough Council* (1) is perfectly clear on this point. It inferentially decides that receiving arrears of rent brings the case within the meaning of the section.

(1) [1929] 2 K.B. 63.
(2) 16 Q.B.D. 403.
(3) 65 J.P. 70.

On the documents the finding that the defendants acted only as solicitors in the course of their business, to enforce payment of rent which was in arrear, cannot be supported.

On the plain meaning of section 2 of the Public Health (Ireland) Act, 1878, the defendants are "owners."

MacDermott K.C., and *J. D. Chambers* for the defendants :—

The words in section 2 of the Public Health (Ireland) Act, 1878, qualify the person receiving the rack-rent.

We submit that the fact that the defendants acted as solicitors in the course of their business to enforce payment of rent in arrear did not bring them within the section. The attention of the defendants was entirely directed to rent that had previously accrued due. It was found as a fact that the defendants acted not as agents but as solicitors.

Having arrived at a finding of fact, the Recorder held that the defendants were not "owners" within the meaning of section 2 of the Public Health (Ireland) Act, 1878.

The letter was written by the defendants as solicitors seeking to enforce payment of rent in arrear. The defendants were authorised to receive arrears of rent, they were not authorised to collect current rent. They never held themselves out as agents to collect rent as it accrued. There is a distinction between a solicitor seeking to recover rent for his client and a solicitor holding himself out to collect rent. The defendants never held themselves out as authorised to collect rent.

The case of *Mayor of St. Helens v. Kirkham* (1) was decided on a different statute. That decision could not apply to the present case as the defendant in that case was liable whether he received the rent or not.

Watts v. Battersea Borough Council (2) is quite different from the present case.

The fact that the rent was in arrear takes the case out of the section.

(1) 16 Q.B.D. 403. (2) [1929] 2 K.B. 63.

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

We rely on the words "the person for the time "being receiving." These words would be quite inappropriate to cover the present case.

The section was intended to apply to whoever was receiving the income. The person has to be receiving the rack-rent of the premises.

On the case as stated no offence has been committed. The onus is on the complainants to prove that the defendants were the agents "for the time being" receiving the rent.

There is no presumption that because twelve payments have been made in eighteen months that the payments must go on. There was no evidence that at the crucial date, that is at the date of the service of the notice, the defendants were the agents.

There is no presumption that a solicitor employed for one purpose is also employed for other purposes.

We rely on *Saffron Walden Second Benefit Building Society v. Rayner* (1) and especially on the words used by James, L.J., at page 409.

We are now entitled to travel outside the case stated to other matters.

We rely on *Kavanagh v. Glorney* (2), where it was held that points of law not raised before the justices may be considered by the Court on a case stated.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This case was stated by the learned Recorder of Londonderry on the hearing of an appeal from an order of the resident magistrate, Mr. Bell, dated 21st January, 1937, convicting and fining the appellants, who are a well known firm of solicitors in Londonderry, and ordering them to abate a nuisance under the Public Health Act, 1878. The premises upon which the nuisance is alleged to exist consist of a dwelling-house known as "Rosemount," Londonderry, which has been for some time past in the occupation of a tenant named Charles Hagan.

On 20th July, 1936, a notice to abate the nuisance was served by the sanitary officer for health of the City of Londonderry on the appellants as "owners" of the premises. It was admitted or proved at the

(1) 14 Ch.D. 406, 409. (2) I.R. 10 C.L. 210.

hearing that there was at the time of the service of such notice, and that there still exists, a nuisance which is injurious to health, the cause of which is long neglect and failure to repair the premises over many years. No attempt was made to abate the nuisance; and, accordingly, on 25th November, 1936, a summons was served upon the appellants alleging the existence of the said nuisance.

The rent of 4*s.* 11*d.* per week payable by the tenant is admittedly a rack-rent. The premises are jointly owned by several persons, most of whom live in America. The agent of the property was a Mrs. Dalway.

On 11th February, 1935, a letter was written by the appellants to the tenant Charles Hagan in the following terms:—

> "We understand Mrs. Dalway has now definitely "given up the agency of your house which is held "under our client, Mr. Robert Hume. Your rent "has only been paid up to 11th August last and "there is a considerable sum now due by you. We "think you should make an effort to pay up this "rent and we are prepared to receive the rent on "behalf of our client."

As a consequence of this letter and of other letters which are not before us, twelve payments on account of rent were received by the appellants between the date of the letter and 13th June, 1936, and these were duly entered by them in Hagan's rent book. Each payment left an arrears of rent outstanding, and such arrears in fact increased between the dates mentioned from the sum of £6 to the sum of £9.

Paragraph 9 of the case contains an important admission by the parties, namely, that for the purposes of the hearing before the Recorder, the appellants, at the date of the letter and on the dates of su sequent payments of arrears of rent, in applying for rent in arrear and demanding and receiving rent in arrear, were acting as solicitors for the owner in respect of said demand and receipt.

The learned Recorder also arrived at certain important findings of fact which appear at the close of the

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

ANDREWS, L.C.J.

case. "On the evidence," he says, "I found as a "fact that, at all material times, the payments were "received by the appellants in the ordinary course of "their business as solicitors as payments on account "of arrears of rent, and I found as a fact on the "evidence that the appellants did not act as agents "for the collection or receipt of current rent, but only "as solicitors in the course of their business to enforce "payment of rent which was in arrear. So finding "on the facts, I held that the appellants were not "owners within the meaning of the Public Health "(Ireland) Act, 1878, and accordingly allowed the "appeal with costs." The case concludes with the question for the opinion of the Court which was expressed in the following terms:—"Was I right in "finding that the appellants were merely solicitors "enforcing payment of rent in arrear and were not "owners within the meaning of the Public Health "(Ireland) Act, 1878."

A serious difference of opinion existed between counsel for the parties who argued the case before us as to the meaning of this question, the appellants contending that the only question for this Court was whether on the above admissions and findings of fact they were "owners" of the premises within section 2 of the Public Health Act, 1878, whilst the respondents submitted that the finding that the appellants were merely solicitors enforcing payment of rent in arrear was also in issue as a mixed question of law and fact.

We came to the unanimous conclusion that it was quite impossible for us to give a confident answer to the question until we were satisfied as to its true meaning. Accordingly, we directed the Registrar to write to the Recorder in the following terms:—

"I have been requested by the Court of Appeal "for Northern Ireland respectfully to direct your "attention to the form of the question which you "have submitted to them in this case stated, upon "the meaning of which there was considerable "difference of opinion amongst counsel who ad- "dressed the Court.

"The Court would be indebted to you if you

"would kindly re-draft the question in such a form "as would remove any doubt as to its intended "scope. Counsel for the appellants submitted that "the only question for the Court to determine is "whether on your findings the appellants are "'owners' within the meaning of the Public Health "(Ireland) Act, 1878; whilst counsel for the "respondents submitted with equal confidence that "it was also your intention to obtain the opinion "of the Court upon whether you were right in "holding on the evidence that the appellants were "'merely solicitors enforcing payment of rent in "'arrear.' This, they submitted, is a finding which "you intended to be open to review as being one "of mixed law and fact, depending, as it was "contended, entirely upon the proper construction "to be placed upon the appellant's letter of 11th "February, 1935, and upon the entries in the rent "book.

"Your kind reply at your early convenience will "be much appreciated by the Court."

In reply to this letter the Recorder, on 14th December, forwarded an amended question which he asked should be substituted for the question as it appeared in the case stated. It is in the following terms:—The question is: "Was I right in holding that the appellants "were not owners within the meaning of the Public "Health (Ireland) Act, 1878, having regard to my "findings of fact as above stated."

The form of this amended question removes any doubt as to its intended scope. The findings of fact are intended to be purely findings of fact and to be accepted as such. They are not in any sense in issue, and our opinion is sought merely upon whether, having regard to those findings, the Recorder was right in holding that the appellants were not "owners" within the meaning of the Public Health Act. In my opinion this view is in accordance with the limited jurisdiction to state a case solely on a point of law, conferred by section 26 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

The term "owner" is defined by section 2 of the

C.A. 1937.

THE CORPORATION OF THE CITY OF LONDONDERRY v. GILLESPIE AND GLASS.

ANDREWS, L.C.J.

Public Health Act, 1878, as meaning "the person for "the time being receiving the rack-rent of the lands "or premises in connection with which the word is "used, whether on his own account or as agent or "trustee for any other person or who would so receive "the same if such lands or premises were let at a "rack-rent."

It will be observed that the section does not refer in terms to solicitors, but solicitors may of course be agents for certain purposes. In my opinion, however, to constitute them "agents" within the definition section they must be acting *as agents* duly appointed and duly authorised to collect rent including current rent, and not merely *as solicitors* authorised in the course of their business to collect a debt which consists of arrears of rent. Accordingly, although I recognise that it would have been competent for the learned Recorder on the material before him to have arrived at a different conclusion of fact and to have held that their authority extended also to the collection of current rent, this in my opinion is not a necessary conclusion, and it would in my judgment be a dangerous precedent for us, in a proceeding of this character, to act otherwise than in loyal acceptance of the findings set out in the case.

The Attorney-General relied very strongly in his argument on the case of *Watts v. Battersea Borough Council* (1), which, though admittedly it had not been cited to the Recorder, was, he said, the basis of their case ; but in my opinion that case avails him nothing. There the solicitor, Watts, who was held to be an agent and therefore an owner within the section, received current rents, not rents in arrear, from the builder, Spicer, who collected them. This in itself sufficiently distinguishes the two cases ; and I, therefore, refrain from expressing any further definite opinion upon a case in which the dissenting judgment of Greer, L.J., makes a strong appeal to my acceptance on the ground that Spicer was not the agent of Watts but rather the agent of the owners who were entitled to the rent, Watts, the solicitor, being a mere intermediary through whom the rent was passed on to the owner.

(1) [1929] 2 K.B. 63.

In my opinion, the answer to the amended question should be in the affirmative. The appellants must have their costs of the case stated which we measure at £15 15*s.* 0*d.*

BEST, L.J.: I concur.

BROWN, J.: I concur.

Solicitors for the appellants: *Caldwell & Robinson.*
Solicitor for the respondents: *Humphrey Babington.*

J. McC.

K.B.D.
1937.

Nov. 30.

MAIDMENT v. MAXWELL (1).

Practice—Costs—Payment into Court with denial of liability—Recovery of same amount as paid into Court—Plaintiff's right—Order XXII, rr. 1 (1), (3), 4.

In an action to recover damages for injuries resulting from the negligence of the defendant, he denied the negligence and paid a sum of money into Court with a denial of liability. The plaintiff did not accept the money paid into Court in satisfaction of his claim, and the action went to trial.

At the trial the jury found that the defendant was guilty of negligence and that the plaintiff was not guilty of negligence, and they assessed the damages at £200, which was exactly the same amount as had been paid into Court.

Held, by the trial judge (Andrews, L.J.), that the sum lodged in Court by the defendant while denying liability should be paid out to the plaintiff in satisfaction of the damages ;

Held, also, that the plaintiff should have the costs of the action up to the lodgment of the sum of £200 and also the costs of the issues of negligence and contributory negligence treated as separate issues, whilst the defendant should have the general costs of the action after such lodgment ; and that the Taxing Master should set off the costs awarded to the plaintiff against the costs awarded to the defendant and should certify the balance, and that judgment should be entered for such balance of costs for the party in whose favour such balance should be found.

Trial of Action.

The action was brought to recover damages for personal injuries sustained by the plaintiff, and alleged to have arisen by reason of the negligence of the defendant, his servant or agent, in the driving, management and control of a motor car, the property of the defendant, and for consequential loss and damage.

The defendant by his statement of defence denied that he had been guilty of negligence, and averred contributory negligence on the part of the plaintiff. He also stated that the plaintiff had not suffered the alleged or any injury or loss or damage, and that such

(1) In the King's Bench Division before Andrews, L.J., and a special Jury.

injury or loss or damage if suffered by the plaintiff, was not occasioned by any act, neglect, or default upon the part of the defendant or any servant or agent of the defendant.

By notice, dated 24th June, 1937, the defendant, while denying liability, brought into Court the sum of £200, and stated that that sum was sufficient to satisfy the plaintiff's claim.

The plaintiff did not take out the sum paid into Court, and the action proceeded to trial before Andrews, L.J., and a special jury.

The following were the questions put to the jury by the trial judge and the jury's answers :—

(1) Was the defendant guilty of negligence ?
Answer : Yes.

(2) Was the plaintiff guilty of negligence ?
Answer : No.

(3) If both plaintiff and defendant were guilty of negligence—
(*a*) Could the defendant have avoided the consequences thereof ? Not answered.
(*b*) Could the plaintiff have avoided the consequences thereof ? Not answered.

(4) Damages ? Answer £200.

The trial judge decided to hear argument as to the effect of the assessment by the jury of the damages at £200, being exactly the same amount as had been paid into Court and also as to the proper form of the order.

Lowry, K.C. (with him *J. D. Chambers*) for the defendant :—

The English Rules have not been the same precisely as our Rules. We rely on *McNeece v. Moore* (1), where it was held that when money is lodged in Court with a defence denying liability, and the plaintiff recovers less than the amount lodged, the Court has power under Order XXII, r. 7 (*c*), to order that the amount found in the plaintiff's favour shall not be paid out to the plaintiff, but may be applied in part satisfaction of the defendant's costs.

(1) 38 I.L.T.R. 153.

K.B.D. 1937.

MAIDMENT v. MAXWELL.

We submit that the defendant is entitled to the general costs of the action.

The sum of £200 should be retained in Court pending the taxation of costs.

T. J. Campbell, K.C., E. S. Murphy, K.C. (with them *Sheil*) for the plaintiff :—

This case shows the benefit the defendant can get by raising two issues.

In *Powell v. Vickers, Sons & Maxim, Ltd.* (1), it was held that if a defendant in an action for unliquidated damages denies liability, but pays money into Court, and the plaintiff proceeds with the action and recovers from the defendant an amount which carries costs, but is less than the sum paid into Court, the plaintiff is entitled to the whole costs of the action down to payment in, and the subsequent costs of issues on which he succeeds.

It was also held that the making of an order under Order XXII, r. 6 (*c*), for payment out, of money paid into Court by a defendant with a denial of liability is discretionary, but the presumption is that the amount recovered by the plaintiff should be paid out to him, and it lies on the defendant to rebut the presumption.

Wagstaffe v. Bentley (2) was an action to recover damages for injuries arising from the negligence of the defendants. They denied the negligence and paid a sum of money into Court with a denial of liability.

The plaintiffs did not accept the money paid into Court in satisfaction of their claim, and the action went to trial and resulted in a verdict for a less amount. The judge who tried the case ordered judgment to be entered for the defendants with the general costs of the action, and that the plaintiffs should have the costs of the issues found in their favour.

It was held that the questions raised by the pleadings, whether the defendants had been guilty of negligence, and, if so, whether the money paid into Court was sufficient, were distinct issues, and that the plaintiffs were entitled to their costs on the issue of negligence on which they had succeeded.

(1) [1907] 1 K.B. 71. (2) [1902] 1 K.B. 124

In the present case the jury has found the defendant negligent and the plaintiff not negligent.

The plaintiff is entitled to have his costs on the issues of negligence and contributory negligence found in his favour.

The plaintiff is also entitled to have the sum of £200 lodged in Court paid out to him.

ANDREWS, L.J.

ANDREWS, L.J. : I entirely approve of the practice laid down by the English Court of Appeal in *Powell v. Vickers, Sons & Maxim, Ltd.* (1). In that case it was held that the defendant was not entitled to have the money lodged in Court retained until after the taxation of costs merely because the jury had awarded a sum less than the amount lodged. To allow it so to remain would be to give to the defendant a security for costs to which he is not entitled. No doubt the Court has a discretion in the matter which may be exercised in favour of the defendant in a proper case ; but the onus is on the defendant to assign some good and sufficient reason, and that onus has not been discharged in the present case.

The plaintiff has succeeded in establishing the defendant's liability on the issues of negligence, but he has failed on the separate and distinct issue as to the sufficiency of the sum paid into Court to cover the liability. This partial success and partial failure must be reflected in the order as to costs.

The order as to costs was in the following terms :—

> That the plaintiff do have the costs of the action up to the lodgment of said sum and also the costs of the issues of negligence and contributory negligence treated as separate issues, and that the defendant do have the general costs of the action after such lodgment, and that the Taxing Master do set off the costs so awarded to the plaintiff against the costs awarded to the defendant and certify the balance, and that judgment be entered for such balance of costs for the party in whose favour it shall be found.

Solicitor for the plaintiff : *Anthony Lunn.*
Solicitor for the defendant : *J. Morris McKee.*

J. McC.

(1) [1907] 1 K.B. 71.

K.B.D.
1938.

CLARKE v. HARPER AND ROBINSON (1).

Mar. 25, 29.
April 29.

Practice—Service of Writ of Summons out of the Jurisdiction—Order XI, rule 1 (e) (iii)—Action for Breach of Contract—Whether order giving liberty to serve Writ of Summons out of jurisdiction made without jurisdiction—Whether order only intended to apply to cases where different systems of law prevail —" The action is one brought to enforce . . . or otherwise affect a contract . . . by its terms or by implication to be governed by the law of Northern Ireland."

The plaintiff brought an action for the recovery of the sum of £78 7*s.* 4*d.* being the balance alleged to be due by the defendants who carried on business in London to the plaintiff, an egg and poultry merchant residing at K., in the County of Armagh. The action was brought in respect of a contract for the sale of turkeys by the plaintiff to the defendants. It was admitted that the contract was made in England by the telegraphic acceptance from London of plaintiff's offer to sell to the defendants a supply of turkeys. These turkeys were to be delivered by the plaintiff f.o.b., Belfast, for despatch to London. It was also admitted that the contract was to be wholly performed in Northern Ireland. Three consignments of turkeys were in dispute. The first of these, valued at £34 14*s.* 10*d.*, the defendants refused to accept in London, on the ground that they arrived late. The second consignment, valued at £31 13*s.* 1*d.*, was alleged to have arrived in bad condition, and the third, consisting of one case of turkeys, valued at £12 0*s.* 10*d.*, was alleged not to have arrived at all.

Brown, J., gave liberty to issue and serve a writ of summons in the action out of the jurisdiction. The writ was accordingly issued and subsequently a notice of motion to set aside the order of Brown, J., was served. Before the motion to set aside the order came on for hearing the plaintiff died.

The action was afterwards revived, but no further step was taken for almost three years when the plaintiff served notice of intention to proceed. The defendant then caused his motion for service out of the jurisdiction to be re-entered.

Order XI, rule 1 (*e*) (iii) of the Rules of the Supreme Court (Northern Ireland), 1936, provides that " Service out of the juris- " diction of a writ of summons or notice of a writ of summons may " be allowed by the Court or a Judge whenever (*inter alia*) the action " is one brought to enforce . . . or otherwise affect, a contract, " . . . . by its terms or by implication to be governed by the law " of Northern Ireland."

(1) In the King's Bench Division before Andrews, L.C.J.

Held, by Andrews, L.C.J. (*a*) that Order XI, rule 1 (*e*) (iii) is not confined in its application to cases in which different systems of law prevail in Northern Ireland and in the other country; but (*b*) that the contract sued upon was not one which, by its terms or by implication, was to be governed by the law of Northern Ireland within the meaning of these words as contained in the rule; and, accordingly, that the defendant's motion to set aside the order of Brown, J., giving liberty to issue and serve the writ of summons out of the jurisdiction, must be granted.

MOTION to set aside order for service of a writ of summons out of the jurisdiction.

The action was for the recovery of the sum of £78 7*s.* 4*d.*, being the balance alleged to be due by the defendants who carried on business in London to the plaintiff, who was an egg and poultry merchant residing at Keady, County Armagh, in respect of a contract for the sale of turkeys by the plaintiff to the defendants, on 10th December, 1932.

It was admitted that the contract was made in England by the telegraphic acceptance from London of plaintiff's offer of 9th December, to sell to the defendants a supply of turkeys which were to be delivered by the plaintiff f.o.b. Belfast, for despatch to London.

It was also admitted that the contract was to be wholly performed in Northern Ireland.

There were three consignments in dispute. The first of these, valued at £34 14*s.* 10*d.*, the defendants refused to accept in London on the ground that they arrived late. The second, valued at £31 13*s.* 1*d.*, was alleged to have arrived in bad condition; whilst the third, consisting of one case of turkeys, valued at £12 0*s.* 0*d.*, was alleged not to have arrived at all.

On 7th November, 1933, Brown, J., gave liberty to issue and serve the writ of summons out of the jurisdiction. The writ was issued on 10th November, 1933, and a notice of motion to set aside the order of Brown, J., was served on 4th December for hearing on 8th December, 1933. The hearing of the motion was adjourned for one week, during which the plaintiff died, and the motion had to stand further adjourned until the action was revived.

K.B.D. 1938.

CLARKE v. HARPER AND ROBINSON.

Probate of the plaintiff's will was extracted on 10th April, 1934, and an order to continue the proceedings in the name of the plaintiff's executrix, Rhoda Clarke, was made upon 26th April, 1935.

No further step was taken in the action until 1st March, 1938, when the plaintiff served notice of intention to proceed. The defendant then caused his motion to set aside the order for service out of the jurisdiction to be re-entered.

Order XI, r. 1, of the Rules of the Supreme Court (Northern Ireland), 1936, provides (*inter alia*) that: "Service out of the jurisdiction of a writ of summons "or notice of a writ of summons may be allowed by "the Court or a Judge whenever (*e*) the action is one "brought to enforce, rescind, dissolve, annul, or "otherwise affect, a contract, or to recover damages "or other relief for or in respect of the breach of a "contract, (iii) by its terms or by implication to be "governed by the law of Northern Ireland."

McGonigal, K.C., and *Fox*, in support of the motion to set aside the order for service out of the jurisdiction:—

Order XI, r. 1 (*e*) (iii) is not intended to apply to a case like the present. It is the intention of the parties that must be considered.

The amount in dispute coming within the English County Court jurisdiction, the case could much more conveniently be tried in England than in Northern Ireland. It was not stated before Brown, J., that the amount in dispute was only £43.

There is no doubt that the contract was made in England.

We submit that Brown, J., would not have made the order for service out of the jurisdiction if he had had the full correspondence before him.

We submit that Order XI, rule 1 (*e*), has no application to the present case, as it was only intended to apply to cases in which different systems of law prevail in Northern Ireland and in the other country.

As the English rule contained provisions for the protection of Scotchmen and Irishmen so the corres-

ponding rule in Northern Ireland contained like protection for Englishmen and Scotchmen.

We submit that the order made by Brown, J., was made without jurisdiction.

We rely on *Lenders v. Anderson* (1), and on the history of service of writs out of the jurisdiction as set out there.

We also contend that even though it be unnecessary that different systems of law should prevail in the two countries, yet by the express words of the rule it is necessary that it should be a contract which by its terms or by implication should be governed by the law of Northern Ireland. That is not true of the contract in the present case.

We rely on *Hamlyn & Co. v. Talisker Distillery* (2). In that case Lord Herschell said in his speech in the House of Lords, at page 208 : " the whole of the contract " must be looked at and the rights under it must be " regulated by the intention of the parties as appearing " from the contract."

We also rely on the words used by Lord Watson in his speech at page 212, where he said : " When two " parties living under different systems of law enter " into a personal contract, which of these systems " must be applied to its construction depends upon " their mutual intention, either as expressed in their " contract, or as derivable by fair implication from " its terms."

We also rely on *Jacobs v. Crédit Lyonnais* (3) and on the words used by Bowen, L.J., in his judgment at pages 599 to 601.

The balance of convenience is strongly in favour of the English forum.

We rely on the words used by Lord Wright in his speech in the House of Lords in *Lazard Brothers & Co. v. Midland Bank* (4), where he said at page 307 : " The " Court has discretion to set aside an order made *ex* " *parte* when the applicant has failed to make sufficient " or candid disclosure."

(1) 12 Q.B.D. 50.
(2) [1894] A.C. 202, 207, 208.
(3) 12 Q.B.D. 589, 599, 600, 601.
(4) [1933] A.C. 289, 307.

K.B.D. 1938.

CLARKE v. HARPER AND ROBINSON.

[They also referred to *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* (1), and *Benaim & Co. v. L. S. Debono* (2).]

MacDermott, K.C., and *Miller*, for the plaintiff :—The question is, was this contract by its terms or by implication governed by the law of Northern Ireland ? It is said that that means governed by the law of Northern Ireland where that law is different from the law of England or Scotland as the case may be. There is no authority for that proposition. The law of Northern Ireland is recognised as a separate system. We submit that this contract by implication is governed by the law of Northern Ireland. The contract was made by telegram and was to be wholly performed in Northern Ireland.

In the *Annual Practice*, 1936, page 103, it is stated : " Contracts f.o.b.—In the case of these contracts the " goods become the absolute property of the purchaser " immediately on their being put by the vendor at " his own cost on board the ship named by the pur- " chaser. The place of performance of the contract " would therefore be the place of shipment."

We submit that as the contract was to be performed in Northern Ireland, the law governing the contract was the law of Northern Ireland. The law of Northern Ireland means the whole law including the common law and the statute law whether before or after the Government of Ireland Act, 1920.

Where a contract is to be performed in a particular country it is the law of that country that governs the contract.

In *Ralli Brothers v. Compania Naviera Sota y Aznar* (3), Warrington, L.J., quotes with approval at page 295 this statement from the 2nd edition of *Professor Dicey's Conflict of Laws* (p. 563) ; " When " the contract is made in one country and is to be " performed either wholly or partly in another, then " the proper law of the contract, especially as to the " mode of performance, may be presumed to be the

(1) [1927] A.C 604.
(2) [1924] A.C. 514.
(3) [1920] 2 K.B. 287, 295.

" law of the country where the performance is to take " place."

Lenders v. Anderson (1) is distinguishable from the present case.

If the contract was to be governed by the law of Northern Ireland then there was jurisdiction to make the order.

We rely on *Black v. Baird* (2). That was a case where the contract which the plaintiff proposed to sue upon was made within the jurisdiction. It was held that the fact that the sum in dispute was only £9 10*s.* 0*d.* did not disentitle the plaintiff to an order for service out of the jurisdiction, as the smallness of the amount sued for was not a sufficient reason for refusing the order.

As to what happened before Brown, J., there was no attempt to hide anything from the Court.

It has been contended on behalf of the defendants that Order XI, r. 1 (*e*), has no application to the present case and that that rule was only intended to apply to cases where different systems of law prevail.

We submit that the expression " the law of Northern " Ireland " is to have its ordinary meaning.

It is an implication of law that the law of the place where the contract is to be performed is to apply. That was established in *Ralli Brothers v. Compania Naviera Sota y Aznar* (3).

There is nothing in this rule which justifies the application of any such artificial construction as has been attempted by the defendants.

[They also referred to *Jacobs v. Crédit Lyonnais* (4), *Hamlyn & Co. v. Talisker Distillery* (5), and *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* (6).]

Fox (in reply) :—

There is nothing to show that this contract was to be performed in Northern Ireland.

(1) 12 Q.B.D. 50
(2) 31 I.L.T. 8.
(3) [1920] 2 K.B. 287.
(4) 12 Q.B.D. 589.
(5) [1894] A.C. 202.
(6) [1927] A.C. 604.

K.B.D. 1938.

CLARKE v. HARPER AND ROBINSON.

The question of the proper law to apply does not arise in the present case, that question only arises when there are conflicting systems of law.

We rely on the words used by Lord Herschell, L.C., in his speech in the House of Lords in *Hamlyn & Co. v. Talisker Distillery* (1) at pages 207 and 208.

Order XI, r. 1 (*e*), was made deliberately after considering the position as between England and Northern Ireland.

Benaim & Co. v. Debono (2) is of no assistance in the present case.

The cases which have been relied on on behalf of the defendants are cases where there were conflicting systems of law.

Cost is even more important than convenience.

We submit that if Brown, J., had considered this difficult question of jurisdiction and also had been made aware that the amount in dispute was £43, a sum well within the English County Court jurisdiction, he would not have made the order for service out of the jurisdiction.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is an action for the recovery of the sum of £78 7*s.* 4*d.*, being the balance alleged to be due by the defendants, who carry on business in London, to the original plaintiff, who was an egg and poultry merchant residing at Keady, in the County of Armagh, in respect of a contract for the sale of turkeys by the plaintiff to the defendants on 10th December, 1932. It is admitted that the contract was made in England by the telegraphic acceptance from London of plaintiff's offer of 9th December to sell to the defendants a quantity of turkeys which were to be delivered by the plaintiff f.o.b., Belfast, for despatch to London. It is likewise admitted that the contract was to be wholly performed in Northern Ireland.

There are three consignments or parts of consignments in dispute. The first of these, valued at £34 14*s.* 10*d.*, the defendants refused to accept in London on the ground that they arrived late. The

(1) [1894] A.C. 202, 207, 208. (2) [1924] A.C. 514.

second, valued at £31 13*s.* 1*d.*, is alleged to have arrived in bad condition; whilst the third, consisting of one case of turkeys, valued at £12 0*s.* 10*d.*, is alleged not to have arrived at all.

On 7th November, 1933, Brown, J., gave liberty to issue and serve the writ of summons out of the jurisdiction. The writ was, accordingly, issued on 10th November, 1933, and a notice of motion to set aside the order of Brown, J., was served on 4th December for hearing on 8th December, 1933. The hearing of the motion was adjourned for one week, during which the plaintiff died, and the motion had accordingly to stand further adjourned until the suit was revived. Probate of the plaintiff's will was extracted on 10th April, 1934, and an order to continue the proceedings in the name of the plaintiff's executrix, Rhoda Clarke, was made upon 26th April, 1935. No further step was, however, taken in the matter until 1st March, 1938, when the plaintiff served notice of intention to proceed. This move was countered by the defendant causing his motion to set aside the order for service out of the jurisdiction to be re-entered. It is this motion which was argued before me and upon which I reserved my judgment.

The first and most important point contended for by Mr. McGonigal on behalf of the defendants is that the order was made without jurisdiction. This depends entirely upon the true construction of Order XI, r. 1 (*e*) (iii), which is the only part of that long rule upon which the plaintiff places reliance. The question to be determined is whether the action is one brought to enforce . . . or otherwise affect a contract by its terms or by implication to be governed by the law of Northern Ireland. If the answer be in the affirmative the order was made with jurisdiction, but not otherwise.

The portion of Order XI, r. 1 (*e*), to which I have referred was first introduced into our Rules of Court in the year 1922. It was taken from the corresponding English rule passed in the year 1921. Mr. McGonigal submits that it has no application to the present case, as it was only intended to apply to cases in which different systems of law prevail in Northern Ireland

K.B.D. 1938.

CLARKE v. HARPER AND ROBINSON.

ANDREWS, L.C.J.

and in the other country for which jurisdiction is contended. No such difference of course exists in the present case, as the law applicable to it is under the Sale of Goods Act, 1893, the same in both Northern Ireland and England.

It has, of course, to be admitted by Mr. McGonigal that the rule contains no express provision as to the necessity for the existence of such different systems of law. He relies, however, upon the history of service of writs out of the jurisdiction as set out and illustrated in *Lenders v. Anderson* (1), and contends that as the English rule, as it existed in 1883 when that case was decided, contained provision for the protection of Scotchmen and Irishmen, so our corresponding rule contained like protection for Englishmen and Scotchmen. In these circumstances he submits that the new rule was not intended to take away any protection originally given to Scotch and English merchants.

In the absence of any authority in support of this view, I must, with the greatest respect, regard this submission as rather assertion than argument ; especially as in the rule, as it at present stands, the protection given to a defendant domiciled or ordinarily resident in England or Scotland is only to be found in the portion of the rule which follows and which in no way governs that portion which is relied upon in the present case.

In my opinion the proposition thus contended for by Mr. McGonigal cannot be supported. Let us suppose that in the present case the parties, perhaps in ignorance or forgetfulness that the law in both countries was identical, had expressly provided that the contract should be governed by the law of Northern Ireland. Could it be reasonably contended in such circumstances that the case did not come within the rule merely because the two systems of law were in fact identical ? In my opinion the answer must be in the negative—that the existence of two different systems of law is not absolutely essential for the application of the rule, though I recognize that in most cases in practice such different systems probably would so exist.

(1) 12 Q.B.D. 50

Mr. McGonigal, however, presents a second limb to his argument which appears to me to carry much more weight. It is that, even though it be unnecessary that different systems of law should prevail in the two countries, yet by the express words of the rule it is necessary that it should be a contract which by its terms or by implication should be governed by the law of Northern Ireland, and this, he submits, cannot be said of the contract in the present case. It is a contract entered into in England. Had the parties chosen to do so it would have been competent for them, as I have already indicated, to have made an express stipulation that their contract should be governed by a particular law; but they did not do so. On this point the contract is absolutely silent. In the absence of such stipulation the authorities are clear that it is necessary for the Court to ascertain from a consideration of the contract as a whole what the intention of the parties was or may be presumed to have been. *Prima facie* the law governing a contract is presumed to be the *lex loci contractus*—the law of the country where the contract was made. As Bowen, L.J., put it in *Jacobs v. Crédit Lyonnais* (1): "The "broad rule is that the law of a country where a "contract is made presumably governs the nature, "the obligation and the interpretation of it, unless "the contrary appears to be the express intention "of the parties." *Dicey in his Conflict of Laws*, 4th Edit., at p. 632, likewise says that it is an undoubted rule of English law that the meaning of a contract and the obligations arising under it are *prima facie* and presumably governed by the law of the country where the contract is made (*lex loci contractus*). This presumption may, however, be rebutted by other circumstances; and in the present case the circumstance relied upon by Mr. MacDermott, on behalf of the plaintiff, is that the contract was wholly to be performed in Northern Ireland. Several cases could be cited in which it has been held that a contract made in one country, but which is wholly to be performed in another country, may in the absence of other

(1) 12 Q.B.D. 589, 600.

K.B.D. 1938.

CLARKE v. HARPER AND ROBINSON.

ANDREWS, L.C.J.

circumstances be regarded as intended by the parties to be governed by the *lex loci solutionis* (see per Lord Esher, M.R., in *Chatenay v. Brazilian Submarine Telegraph Co.* (1); but in my opinion there is a circumstance in the present case which is absolutely fatal to a presumption of any such intention by the parties, namely, that the law of both countries—England and Northern Ireland in regard to the contract is identical. I can well understand that where the law of the two countries is different the parties may intend that their rights and obligations should be determined by the law of the country where the contract is to be performed (see judgment of Exchequer Chamber in *Lloyd v. Guibert* (2), cited by Bowen. L.J., in *Jacobs v. Crédit Lyonnais* (3), at foot of p. 600).

It may also be, as I have already pointed out, that the parties through ignorance or forgetfulness may expressly provide for the application of the *lex loci solutionis* even though it is identical with the *lex loci contractus*, but I find it impossible to *presume* any such intention where the *lex loci contractus* and the *lex loci solutionis* are the same. The truth is, as Mr. McGonigal said, that such a matter would in all probability never enter into the minds of the parties where the same system of law prevails in both countries. In *Hamlyn & Co. v. Talisker Distillery & Others* (4), the House of Lords presumed the intention contended for in the present case, but there different systems of law prevailed in the two countries—England and Scotland. The importance of this fact is to be seen in the speech of Lord Herschell, L.C., who (at p. 207) said : " Where " a contract is entered into between parties residing in " different places, *where different systems of law prevail*, " it is a question, as it appears to me, in each case, with " reference to what law the parties contracted, and, " accordingly, to what law it was their intention that " their rights either under the whole or any part of " the contract should be determined." Lord Watson expressed precisely the same view when he said (at p. 212) : " When two parties *living under different systems*

(1) [1891] 1 Q.B. 79.
(2) L.R. 1 Q.B. 115, 122.
(3) 12 Q.B.D. 589, 600.
(4) [1894] A.C 202.

"*of law* enter into a personal contract, which of these "systems must be applied to its construction depends "upon their mutual intention either as expressed in "their contract, or as derivable by fair implication "from its terms."

I am, accordingly, of opinion that the contract sued upon in this case was not one which by its terms or by implication was to be governed by the law of Northern Ireland within the meaning of these words as contained in the rule. So holding I find it unnecessary for me to express any opinion upon the other points argued by Mr. McGonigal as to comparative cost and convenience of proceedings under Order 11, r. 2, or as to want of *uberrima fides* in the affidavit upon which the order for service out of the jurisdiction was obtained.

The defendants' motion must, accordingly, be granted with costs.

Solicitor for the plaintiff: *James G. Lennon.*
Solicitors for the defendants: *Carson & McDowell.*

J. McC.

C.A. 1938.

May 4.

In the Matter of the ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, and In the Matter of an ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD (1).

Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 *Geo.* 5, *c.* 15) *Special Case Stated for opinion of Supreme Court—Establishment of Road Transport Board and transfer of existing road transport undertakings—Provisions for compensation—Whether Road Transport Arbitration Tribunal empowered to grant compensation in case of an owner-manager for loss of employment and on what basis, where undertaking transferred to Road Transport Board—Road and Railway Transport Act (Northern Ireland)*, 1935, *section* 36.

In the year 1921 the claimant commenced business as a haulier and carried it on from that date until the undertaking was acquired by the Road Transport Board on 3rd June, 1936. In May, 1922, his brother joined him in the business and from that date until 3rd June, 1936, the business was carried on by the claimant and his brother with some help from a sister. The claimant had a steady employment taking up a considerable part of his time in the working of the undertaking.

Under the Road and Railway Transport Act (Northern Ireland), 1935, in the ordinary course the claimant would receive compensation for the value of the physical assets and the goodwill of the business. He would not, under the scheme submitted by the Road Transport Board, be entitled to compensation for loss of employment such as would be given to ordinary employees under section 36 of the Act.

The claimant contended that he was entitled to compensation for loss of employment as part of the award to be made by the tribunal.

Section 36 (1) of the Act provided that where an undertaking or part of an undertaking was transferred to the Board under the Act, compensation should be payable by the Board to any person who, immediately before the day of transfer of the undertaking or part of an undertaking, was employed by the former undertakers as a whole-time officer or servant in connection with the road transport service of the undertaking.

(1) In the Court of Appeal before Andrews, L.C.J., Best, L.J. and Babington, L.J.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

The Act contained no provision providing for compensation in the case of an owner-manager for loss of employment caused by the undertaking having been transferred to the Road Transport Board.

Under the provisions of section 5 (2) of the Act the Board served upon the claimant a notice in writing specifying the 3rd June, 1936, as the day on which the claimant's road motor undertaking was to be transferred to and vest in the Board.

Under the provisions of section 6 (*d*) of the Act the Board, by letter dated 12th January, 1937, notified the arbitration tribunal that the claimant and the Board were unable to agree as to the amount of the consideration for the transfer of the claimant's undertaking.

Under the provisions of section 6 (*e*) of the Act, the Board and the claimant prepared and submitted to the arbitration tribunal schemes setting out the amount and nature of the consideration which the parties respectively considered ought to be accepted by the tribunal as being in accordance with the provisions of the Act.

Under the provisions of section 7 (2) of the Act the claimant and the Board with their respective witnesses on 7th January, 1938, appeared and were examined before the arbitration tribunal, and at a sitting of the tribunal on 11th January, 1938, the claimants handed to the tribunal forms of three questions and asked the tribunal to state them by way of a special case for the decision of the Supreme Court. The tribunal refused this request.

On 2nd March, 1938, the claimant applied to the King's Bench Division for an order directed to the arbitration tribunal to state a special case. The arbitration tribunal submitted two questions which they had prepared and were willing to state as a special case. The King's Bench Division made no rule on the motion and approved of the form of questions prepared by the arbitration tribunal.

The arbitration tribunal stated as a special case for the decision of the Supreme Court under section 7 (4) of the Act the following question of law arising in the course of the proceedings, whether the tribunal are empowered under the Act to grant compensation for loss of employment to the owner by reason of his undertaking being transferred to the Transport Board and, if so, on what basis should the amount of such compensation be determined.

Held, by the Court of Appeal (Andrews, L.C.J., Best, L.J., and Babington, L.J.) that the tribunal was not empowered either under the general law or under the Road and Railway Transport Act (Northern Ireland), 1935, to grant compensation in the case of an owner-manager for loss of employment by reason of his undertaking having been transferred to the Road Transport Board.

SPECIAL CASE STATED for the opinion of the Supreme Court of Judicature in Northern Ireland under section 7 (4) of the Road and Railway Transport Act (Northern Ireland), 1935, by the arbitration tribunal appointed under section 7 (1) of that Act.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

Robert Dick Megaw, a Judge of His Majesty's High Court of Justice in Northern Ireland, Wilfred Hugh Fitzsimons, Fellow of the Institute of Chartered Accountants in Ireland, and John B. Morrison, one of His Majesty's Justices of the Peace for the County of Antrim were appointed to be the Arbitration Tribunal for the purposes contained in the said Act by the Lords Justices of Northern Ireland under the hand of the Right Honourable James Andrews one of the said Lords Justices on the 14th day of March, 1936, in pursuance of the provisions of sub-section 1 of section 7 of the said Act.

Pursuant to the provisions of sub-section 2 of section 5 of the said Act the above-named Northern Ireland Road Transport Board (hereinafter referred to as "the Board") served upon the above-named Alexander Lennon (hereinafter referred to as "the "owner") on the 1st day of May, 1936, a notice in writing specifying the 3rd day of June, 1936, as the day on which the road motor undertaking of the owner was to be transferred to and vest in the Board.

Pursuant to the provisions of sub-section 3 of section 5 of the said Act the said road motor undertaking of the owner was transferred to and vested in the Board on the said 3rd day of June, 1936.

Pursuant to provision (*d*) of section 6 of the said Act the Board by letter dated the 12th day of January, 1937, notified the Arbitration Tribunal that the owner and the Board were unable to agree as to the amount of the consideration for the transfer of the said undertaking of the owner.

Pursuant to provision (*e*) of section 6 of the said Act the Board and the owner prepared and submitted to the Arbitration Tribunal schemes setting out the amount and nature of the consideration which the said parties respectively considered ought to be accepted by the Tribunal as being in accordance with the provisions of the said Act.

Pursuant to the provisions of sub-section (2) of section 7 of the said Act the owner and the Board with their respective witnesses on the 7th day of January, 1938, appeared and were examined before

the Arbitration Tribunal sitting in the Chancery Court, Royal Courts of Justice (Ulster), Belfast, and at a sitting of the Tribunal on the 11th day of January, 1938, the owner by his counsel handed in to the Tribunal forms of three questions and asked the Tribunal to state them by way of a special case for the decision of the Supreme Court. The Tribunal refused this request.

On the 2nd day of March, 1938, the owner made application to the King's Bench Division of the High Court of Justice in Northern Ireland for an order directed to the Arbitration Tribunal to state a special case in the form referred to in paragraph 6 hereof. At the said hearing the Arbitration Tribunal submitted two questions (being in the form hereinafter appearing) which they had prepared and were willing to state as a special case. The said Court made no rule on the said motion and approved of the form of questions prepared by the Arbitration Tribunal.

Having heard and considered the evidence tendered by the owner and by the Board, the Tribunal made the following findings of fact :—

(*a*) The owner commenced business as a haulier in 1921 and carried it on from that date until the undertaking was acquired by the Board on the 3rd day of June, 1936.

(*b*) In May, 1922, his brother, Quinton Lennon, joined the owner in the business and from that date until the 3rd June, 1936, the business was carried on by the owner and the said Quinton Lennon with some help from a sister.

(*c*) The owner had a steady employment taking up a considerable part of his time in the working of the undertaking.

The evidence was not satisfactory as to the respective parts taken in the business by the three members of the family. For example in the accounts which were kept by Quinton Lennon two entries appeared of £39 and £26 in respect of wages for the said sister but these were stated to be " nominal entries " only. That the sister gave some service to the business must, however, be accepted.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

The evidence was also not satisfactory as regards the part in the business taken by the owner. Under cross-examination the owner stated that his brother the said Quinton Lennon, more or less managed the business and that he (the owner) supposed his own work as assistant was worth 30*s.* 0*d.* per week.

Under the Act in the ordinary course the owner would receive compensation for the value of the physical assets and the goodwill of the business. He would not under the scheme submitted by the Board be entitled to compensation for loss of employment such as would be given to ordinary employees under Part V (section 36) of the Act or otherwise, and the owner contends that he is entitled to compensation for loss of employment as part of the award to be made by the Tribunal.

Pursuant to the provisions of sub-section 4 of section 7 of the said Act the Tribunal stated as a special case for the decision of the Supreme Court the following question of law arising in the course of the said proceedings, namely :—

> Whether the Tribunal are empowered under the Act to grant compensation for loss of employment to the owner by reason of his undertaking being transferred to the Transport Board and if so on what basis should the amount of such compensation be determined.

Black, K.C., Warnock, K.C., and *J. D. Chambers* for the claimant :—

The net point is whether the Tribunal ought to compensate an owner-manager for loss of employment, and if so on what basis ?

The only important statement of fact in the case stated is that the owner had a steady employment taking up a considerable part of his time in the working of the undertaking. The Tribunal have decided that in no case are they entitled to grant compensation for loss of employment where the owner managed his own business.

The Tribunal arrived at a basic figure of £80 as the amount on which goodwill should be calculated. One

of the elements of value to the claimant was that this business provided him with a livelihood. No allowance is made for this element in the Board's scheme. It was held by the Tribunal that a sum must be deducted for expenses of management from the amount allowed for goodwill. We submit that this system is unsound.

The avenue of employment as a haulier is closed to the plaintiff. It is the value of the loss to the man whose property is being acquired, that must be considered.

Andrews, L.J., in his judgment in *O'Neill v. The Northern Ireland Road Transport Board* (1), stated that: "It is claimed that reasonable employment, "especially in these days of uncertainty in the labour "market, is an advantage, and, therefore, the subject "of compensation, and, indeed, that ownership is a "protection against unemployment." That claim is referred to without criticism.

We rely on *In re Lucas and Chesterfield Gas and Water Board* (2), and especially on the words used by Fletcher Moulton, L.J., in his judgment at page 29, dealing with the principles upon which compensation is assessed when lands are taken under compulsory powers.

The position in the present case is that the claimant is prevented from carrying on his business and earning his living.

We rely on the words used by Lord Dunedin in delivering the judgment of the Privy Council in *Cedars Rapids Manufacturing and Power Company v. Lacoste* (3), where he stated these two propositions: (*a*) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker; (*b*) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

We also rely on the words used by Lord Buckmaster in delivering the judgment of the Privy Council in *Fraser v. City of Fraserville* (4), at page 194, where he

(1) [1938] N.I. 104, 122.
(2) [1909] 1 K.B. 16, 29.
(3) [1914] A.C. 569, 576.
(4) [1917] A.C. 187, 194.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

said : " The value to be ascertained is the value to the " seller of the property in its actual condition at the " time of expropriation with all its existing advantages " and with all its possibilities, excluding any ad- " vantage due to the carrying out of the scheme for " which the property is compulsorily acquired, the " question of what is the scheme being a question of " fact for the arbitrator in each case."

The undertaking had provided the claimant with two advantages, first it provided him with a job and remuneration for that job, and secondly it provided him with a surplus over and above the remuneration. The first advantage was just as important as the second, and could not be left out when the question of compensation was being considered. To have a job is an advantage for which a man would be willing to pay something. In the present case the claimant had a job which provided him with a livelihood. That is an element for which he should be compensated.

The position was put very well by Sir Lynden Macassey at page 77 of the Appeal Book, where he said the business contained two distinct elements of value. First of all the element that it provides him with employment and with remuneration which he derives from that employment. Secondly it provides him with a business which is a profitable business and one which has a goodwill in the market, to any person who agreed to purchase it.

In his judgment in *O'Neill v. The Northern Ireland Road Transport Board* (1), Andrews, L.J., stated at page 124 : " We are clearly of opinion that it would be " quite wrong to value a transferred undertaking " compulsorily acquired under the Act as if in fact it " were being sold by a willing seller to a willing " purchaser."

The legislature recognised that one of the advantages that the operator had was his job. He has lost the profits which he was able to invest and set aside. He must be compensated for the loss of his office. An element to be taken into consideration was the consequence of his losing his employment.

(1) [1938] N.I. 104, 124.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.C.J.

J. M. Whitaker, K.C., MacDermott, K.C., and *Curran* for the Northern Ireland Road Transport Board were not called upon.

ANDREWS, L.C.J. : We have had an opportunity of considering this case during the luncheon interval and do not require to hear counsel for the Transport Board.

The arguments for the claimant have been put very clearly and forcibly before us by Mr. Black. The point in issue is whether the Tribunal is empowered under The Road and Railway Transport Act (Northern Ireland), 1935, to grant compensation in the case of an owner-manager for loss of employment by reason of his undertaking being transferred to the Board ; and if so, on what basis should such compensation be ascertained ?

The matter which we have to consider is one of considerable importance. The first observation which I wish to make is that the point debated in the present case was not decided by this Court in *O'Neill v. The Northern Ireland Road Transport Board* (1), either expressly or by implication. I want to make that very clear because of the submissions made by counsel for the claimant before the Tribunal in the present case. No doubt the point might have been raised in that case, but in fact it was not raised ; and our judgment cannot be extended and applied to matters which were not debated before us. In that judgment there was only one reference to employment, and that was purely as a matter of argument and claim, and not as a matter of judicial opinion.

The claim is one of very wide application ; for it is now admitted that if the proposition that the owner of an undertaking is entitled to compensation for loss of employment by reason of the transfer of his undertaking to the Board is sustainable at all, it cannot be confined to the case of an owner-manager but must be held to apply to all undertakings taken over by the Road Transport Board. In view of this fact, it is somewhat significant that, although several cases had been decided by the Tribunal and several others

(1) [1938] N.I. 104.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITARTION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

ANDREWS, L.C.J.

had been settled by the Board prior to the hearing of the present case, it does not appear to have been considered in any of those cases that compensation should be given for loss of employment to an owner claimant.

The claim was presented to us in a twofold manner ; first, that compensation was payable under the general law, and secondly, although not so forcibly, that it lay under the provisions of the Road and Railway Transport Act (Northern Ireland), 1935.

As regards the claim made under the statute, stress has been laid by Mr. Black on the fact that section 36 of the Act of 1935 provides for the payment of compensation to persons in the employment of transport undertakings who have lost their employment by reason of the transfer of such undertakings to the Board. Instead of that section helping Mr. Black, as he argued that it did, its presence in the Act is, in my opinion, an argument against rather than an argument for the granting of the compensation for which he now contends. When we look at the provisions of that section, we see that elaborate machinery is provided for arriving at a proper amount of compensation. The basis is made clear. On the other hand, the Act contains no provision dealing with such a case as the present, and different methods have been suggested as to the proper basis of compensation if such be payable. The number of such possible different methods weighs, in my opinion, against the argument that compensation is payable at all in cases such as the present.

I also attach considerable importance to the fact that no claim for loss of employment was made in the scheme of the claimant for compensation, which was lodged with the Tribunal before the hearing. It was only after our decision had been given in *O'Neill's case* (1) that a belated claim was first made, probably in the vain hope that compensation might be obtained in this way which had been refused in another form in *O'Neill's case* (1).

As regards the claim made under the general law, I

(1) [1938] N.I. 104.

only wish to say that not one of the authorities cited on behalf of the claimant justifies the claim in the present case. The principles of those cases were summarised by Lord Buckmaster in *Fraser v. Fraserville (City of)* (1), in the following words :—" The value " to be ascertained is the value to the seller of the " property in its actual condition at the time of ex- " propriation with all its existing advantage and with " all its possibilities, excluding any advantages due " to the carrying out of the scheme for which the " property is compulsorily acquired, the question of " what is the scheme being a question of fact for the " arbitrator in each case." The present claim, which is not part of the value of the undertaking but is a matter entirely personal to the claimant, is not " an " advantage or a possibility " which can be made the subject of compensation under the law as so enunciated.

For these reasons I am satisfied that the claim is not justified either under statute, or under the general law.

ANDREWS, L.C.J.

I have, accordingly, come to the conclusion that the first part of the question put by the Tribunal must be answered in the negative, and therefore the second part of the question does not arise.

BEST, L.J. : I agree with the judgment which has just been delivered.

BEST, L.J.

The question for decision in the present case, whether the owner of an undertaking is entitled to compensation by reason of the transfer of his undertaking, was not before us in *O'Neill v. The Northern Ireland Road Transport Board* (2). No such principle as has been suggested was laid down by this Court in that case. I was surprised to hear it stated that Sir Lynden Macassey had made the claim that the Court of Appeal had already decided this question by implication in favour of the claimant. It is a revelation to me that anyone could spell out of this Court's decision in the *O'Neill case* (2) the proposition that a one man operator should be compensated for loss of employment. No such proposition was put before us until after our

(1) [1917] A.C. 187, 194. (2) [1938] N.I. 104.

C.A. 1938.

IN THE MATTER OF THE ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935, AND IN THE MATTER OF AN ARBITRATION BETWEEN ALEXANDER LENNON AND THE NORTHERN IRELAND ROAD TRANSPORT BOARD.

BEST, L.J.

BABINGTON, L.J.

decision in that case. We neither expressly nor by implication decided the point now before us.

It is quite incredible that, if it had been intended to give compensation under the Road and Railway Transport Act (Northern Ireland), 1935, to owners of transport undertakings who had lost their employment, the Act would have contained no provision dealing with the point.

Apart from compensation to men who have lost their employment, the Act provides for payment in respect of physical assets and goodwill but for nothing further so far as owners of undertakings are concerned.

I agree that the question put by the Tribunal must and should be answered in the negative.

BABINGTON, L.J. : Section 5 of the Road and Railway Transport Act (Northern Ireland), 1935, provides for the transfer of road transport undertakings to the Northern Ireland Road Transport Board.

Section 6 of the same Act contains provisions providing for the consideration to be paid upon such transfer.

It seems to me that the net question we have to decide is whether remuneration earned by the owner, which he loses when his undertaking is acquired by the Board, is part of the undertaking in respect of which compensation must be paid. It was decided in *O'Neill's case* (1) that, in estimating the earnings of the undertaking, the owner's remuneration must be deducted from the gross earnings. I think this decision was right, and if this remuneration be excluded from the undertaking it cannot be a subject of compensation unless there is some specific provision in the Act of 1935 providing for it. It is either part of the undertaking or it is not. In my opinion it is not part of the undertaking and on that short ground cannot be a subject of compensation.

Solicitors for the claimant : *Shean & Dickson.*

Solicitor for the Northern Ireland Road Transport Board : *J. Dunville Coates.*

J. McC.

(1) [1938] N.I. 104.

INDEX.

ACCIDENT—Liability where no Statutory Obligation to Insure 126
See Insurance (Motor).

AGENT—Owner—Nuisance—Public Health (Ireland) Acts 144
See Dwelling House.

ALTERNATIVE REMEDY—Appeal to County Court—Mandamus 1
See Mandamus.

APPEAL TO COUNTY COURT—Alternative Remedy .. 1
See Mandamus.

BOOK DEBTS 83
See Will.

CERTIFICATE of Minister of Home Affairs—Effect—Twenty-five per centum of Population 10
See Licensing Law.

CERTIORARI—Delay in Bringing Proceedings 10
See Licensing Law.

COMPENSATION—Method of Determining 104
See Road and Railway Transport Act (2).

COMPENSATION—Owner-Manager 174
See Road and Railway Transport Act (1).

CONSPICUOUSLY—Indication of Origin 94
See Merchandise Marks.

CONSTRUCTION OF WILL—Bequest of Entire Income and Benefit of Business—Whether Stock-in-Trade and Book Debts Included .. 83
See Will.

CONTINUING INJURY—Corporation—Public Authorities Protection Act .. 137
See Damage.

CONTRACT—Breach—Service out of Jurisdiction—Different Systems of Law .. 162
See Practice (4).

CORPORATION—Liability—Alteration of Street Level—Dampness 137
See Damage.

COSTS—Payment into Court—Recovery of same amount 158
See Practice (2).

COUNTY COURT—Appeal—Alternative Remedy .. 1
See Mandamus.

CUSTODY OF INFANT—Rights of Father and Mother—Welfare of Child 56
See Infant.

DAMAGE CAUSED TO HOUSE BY ALTERATION BY MUNICIPAL CORPORATION OF STREET LEVEL CAUSING DAMPNESS—*Alteration making damp course and ventilator useless—Damp course and ventilator below level of footpath—*8 *&* 9 *Vic.*, c. 142*—Power to alter level—Reasonable necessity—Continuing injury—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict.*, c. 61). The plaintiff claimed for damages caused to his house by alteration in the street level. In December, 1935, he discovered signs of damp in part of the gable. These signs first appeared above the skirting in the little scullery of the house, and the dampness gradually travelled up the wall and spread to the kitchen. The dampness only became apparent when it had travelled as far as the top of the skirting. The damp course and ventilator in the gable were found to be below the level of the footpath in the avenue where the plaintiff's house was situated. In such a position they could not prevent the spreading of damp to plaintiff's house. It was established that the level of this avenue was raised by the works carried out by the defendants, the Corporation of B., in 1928-1929, that the damp which was complained of was caused gradually as a result of the

alteration in level. This alteration buried the damp course and ventilator, making them useless to fulfil their purpose. This damp became manifest for the first time at the end of December, 1935. Section 85 of the Local Act, 8 & 9 Vict., c. 142, empowered the Corporation of B. to alter the level of any street in such manner and form as the Council should think expedient. *Held,* by Best., L.J., affirming the decree of the Deputy Recorder of B., that to justify the Council in making such alteration there must be some reasonable necessity for doing so, the Corporation could not arbitrarily raise or lower the level of streets ; that the Corporation had failed to show that the change of level was necessary or that it served any useful purpose, and that as such alteration caused damage to plaintiff's property, the plaintiff was entitled to succeed in his claim and that he was not barred by any provision in the Corporation Acts ; that as the injury first became apparent to the plaintiff in December, 1935, and the civil bill claiming damages was heard by the Deputy Recorder in May, 1936, the Public Authorities Protection Act, 1893, did not apply.
Dougan v. Belfast Corporation.
[H.C.J. 137

DAMPNESS—Alteration of Street Level—Liability of Corporation 137
See Damage.

DENIAL OF LIABILITY—Payment into Court—Recovery of Same Amount—Costs 158
See Practice (2).

DIVORCE IN UNITED STATES OF AMERICA—Validity in Northern Ireland .. 56
See Infant.

DWELLING HOUSE—Order to abate a nuisance—Payments on account of rent in arrear—*Appellants in applying for rent in arrear and demanding and receiving rent in arrear acting as solicitors for owners — "Owners" — Agents —The Public Health (Ireland) Act,* 1878 (41 & 42 *Vict., c.* 52), *section* 2. On 20th July, 1936, a notice to abate a nuisance was served on the appellants, a firm of solicitors, as "owners" of certain premises consisting of a dwelling house, which had been in the occupation of a tenant. On 25th November, 1936, a summons was served on the appellants as "owners" under section 2 of the Public Health Ireland Act, 1878. The condition of the premises was not improved. On 21st January, 1937, the Resident Magistrate made an order convicting and fining the appellants and ordering them to abate the nuisance. The appellants appealed to the Recorder of L. The actual ownership of the premises lay in a number of persons, most of whom lived in America ; but it was admitted for the purpose of the hearing before the Recorder that the appellants, in applying for rent in arrear and demanding and receiving rent in arrear, were acting as solicitors for the owner in respect of such demand and receipt. On 11th February, 1935, the appellants wrote to the tenant pointing out that he had only paid his rent up to 11th August last and that there was a considerable amount due by him. In this letter they said : "we think you should "make an effort to pay up this rent "and we are prepared to receive the "rent on behalf of our client." The Recorder found as a fact that at all material times the payments were received by the appellants in the ordinary course of their business as solicitors as payments on account of arrears of rent. He also found as a fact on the evidence that the appellants did not act as agents for the collection or receipt of current rent, but only as solicitors in the course of their business to enforce payment of rent which was in arrear. He held that the appellants were not owners within the meaning of the Public Health (Ireland) Act, 1878, and allowed the appeal. The Recorder, however, stated a case for the opinion of the Court of Appeal. The question for the opinion of the Court was expressed by the Recorder in the following terms :—"Was I right "in finding that the appellants were "merely solicitors enforcing payment "of rent in arrear and were not "owners within the meaning of the "Public Health (Ireland) Act, 1878." In response to a request of the Court of Appeal the Recorder forwarded an amended question which he asked should be substituted for the question as it appeard in the case stated. This amended question was as follows :— "Was I right in holding that the "appellants were not owners within "the meaning of the Public Health "(Ireland) Act, 1878, having regard

"to my findings of fact as above "stated." *Held*, by the Court of Appeal (Andrews, L.C.J., Best, L.J., and Brown, J.), that to constitute the appellants agents within the Public Health (Ireland) Act, 1878, section 2, they must be acting as agents duly appointed and duly authorised to collect rent including current rent, and not merely as solicitors authorised in the course of their business to collect a debt which consists of arrears of rent; and that, on his findings of fact, the Recorder was right in holding that the appellants were not "owners" within the meaning of the Public Health (Ireland) Act, 1878. *The Corporation of the City of Londonderry v. Gillespie and Glass.* [C.A. 144

EMPIRE PRODUCE—INDICATION OF ORIGIN 94
See MERCHANDISE MARKS.

ENTERTAINMENT LICENCE—APPEAL 1
See MANDAMUS.

ENTERTAINMENT—LICENCE RENEWAL—VARYING .. 42
See HALL.

EXECUTION CREDITOR—GARNISHEE—RATEABLE DEDUCTIONS—PENSIONS ALLOWANCES AND GRATUITIES 50
See PRACTICE (3).

EXECUTION OF WILLS—PRIORITY—EVIDENCE 130
See WILLS.

FOREIGN COURT—ORDER—SEVERABILITY—VALIDITY .. 56
See INFANT.

GARNISHEE—RATEABLE DEDUCTIONS—PENSIONS ALLOWANCES AND GRATUITIES .. 50
See PRACTICE (3).

HALL USED FOR PUBLIC DANCING, SINGING, MUSIC, BOXING, OR OTHER PUBLIC ENTERTAINMENT OF THE LIKE KIND—APPLICATION FOR RENEWAL *of seven days licence*—SIX DAYS LICENCE *granted by sanitary authority*—"VARYING"—*Local Government Act* (*Northern Ireland*), 1934 (24 & 25 *Geo.* 5, *c.* 22), *section* 31 (1) (11). The D. Rural District Council being the sanitary authority for the district had issued a licence enabling public dancing, singing, music, boxing, or other public entertainment of the like kind to be carried on, on seven days of the week in a Hall known as St. P.'s Hall, T., D. This licence provided that the Hall might be open when used for the purpose of public dancing on seven days of the week, and also for singing, music, and other entertainments on seven days of the week. The licensee applied to the Rural District Council for a renewal of the licence for the year 1936, enabling public dancing to be carried on, on seven days of the week, and also for singing, music and other entertainments on seven days of the week. The Council issued a licence under which public dancing was permitted only on week-days. The licensee appealed to the Court County Judge under section 31 (11) of the Local Government Act (Northern Ireland), 1934. The appeal came before the Acting County Court Judge who made an order reversing the decision of the Rural District Council and allowing public dancing on all seven days of the week with certain restrictions as to hours. The Acting County Court Judge made up his order as a speaking order. Subsequently an application was made on behalf of the Rural District Council to the King's Bench Division for a conditional order quashing the order of the County Court Judge on the ground that the order was made without and in excess of jurisdiction as the Rural District Council had not refused to grant or renew the licence but had in fact renewed the licence, and had imposed on the person to whom the licence was granted a condition prohibiting the use of the Hall for dancing on Sundays. A conditional order was obtained directing cause to be shown why the order of the Acting County Court should not be quashed. Cause having been shown against the conditional order. *Held*, by the King's Bench Division (Best, L.J., and Brown, J.), that the Acting County Court Judge had jurisdiction to hear and determine the appeal as the change that took place in the hours for which the licence was granted amounted to "varying" the licence within section 31 (11) of the Local Government Act (Northern Ireland), 1934. *The King* (*Dungannon R.D.C.*) *v. Acting County Court Judge for County Tyrone.* [K.B.D. 42

IMPORTED GOODS—Indication of Origin 94
See Merchandise Marks.

INCOME AND BENEFIT OF BUSINESS — Stock-in-Trade —Book Debts 83
See Will.

INCONSISTENCY OF WILLS—Same Date—Probate .. 130
See Wills.

INFANT—CUSTODY—Habeas Corpus—Respective Rights of Father and Mother—Welfare of child chief consideration—Decree of divorce in United States of America—*Whether such decree valid in Northern Ireland—Severability of order of Foreign Court—Comity of Courts.* The applicant was the mother of an infant whose custody was the subject matter of an application to make absolute a conditional order of *habeas corpus ad subjiciendum*. She had been married in 1931 in the United States of America. Her husband was a British subject, but she was previous to her marriage a United States subject. Her husband had resided at various times in the United States of America and in England, but had always remained a British subject, and his domicile of origin was unchanged. The applicant stated that her husband had alleged that their marriage was not legal and that she then insisted that they should be re-married, and that this re-marriage took place on October 3rd, 1931. A son, the infant in the present proceedings, was born on April 30th, 1932. The applicant further stated that in or about the month of June, 1932, she went to New York City, and that she was still there in November, 1933, when her husband kidnapped the child from her custody and absconded with it to Northern Ireland. In May, 1934, the child was brought back to the City of New York, and was taken to the home which the husband had provided for himself, his wife and child. The applicant obtained a decree of divorce in the State of Florida, on 12th July, 1934, and also a decree that she should have the sole custody of the child. The husband alleged that he was never served with any document in these divorce proceedings. The child was removed by his father from the applicant's custody on October 20th, 1934. The father alleged that he removed him because he was living under immoral conditions and in immoral surroundings. The father brought the child to Northern Ireland, and he had since remained in that jurisdiction. No steps were taken by the applicant until June, 1936, to recover the custody of the child. She came to Northern Ireland, called at the house of the paternal grandmother of the child, where the child was living and had been well cared for. She demanded that he should be handed over to her, but her demand was refused. Subsequently the applicant obtained a conditional order of *habeas corpus*, and also an order prohibiting the removal of the child out of the jurisdiction of the Court. On the date when cause was to be shown against the conditional order, the child was produced in Court, and an application was made on behalf of the father for an extension of time showing cause. The hearing was adjourned and the child was given into the custody of the applicant on her undertaking that she would produce the child at the adjourned hearing. On the day fixed for the adjourned hearing, Best., L.J., sat to hear the application, and the applicant not having appeared, a peremptory order was made that she appear in Court and produce the body of the child, and that, in default of her doing so, a writ of attachment should issue for her arrest and committal. The applicant had left Northern Ireland with her child and had been traced to Liverpool. She was arrested and brought back within the jurisdiction and she subsequently appeared in Court in custody. The child was also brought back to Northern Ireland. Best, L.J., then ordered her to be confined in prison for the breach of her undertaking and to be kept there until further order. *Held*, by Best, L.J., that he was not compelled by the principle of comity of courts to sever the decree made by the Court in Florida and to give effect only to the part favourable to the applicant while ignoring the part which would be unfavourable to her, in other words to sever that portion of the order relating to the divorce from the other portion granting custody of the child to the applicant. *Held further*, by Best, L.J., that the welfare of the child being the paramount consideration, that such welfare would be best secured by allowing the

child to remain with the consent of his father in the custody of his paternal grandmother and her daughter, who had been keeping the child for nearly three years and caring for him on behalf of the father. *Held*, by the Court of Appeal (Andrews, L.J., and Brown, J.), affirming Best. L.J., that the decree of divorce *a vinculo* is not valid or legally binding in Northern Ireland, so that the child's parents were still husband and wife in law, and that the decree of divorce *a vinculo* could not be treated as a decree of divorce a *mensa et thoro*. *Held further*, affirming Best, L.J., that the Courts were not obliged out of regard to the principle of comity of Courts to sever the decree and give legal effect to that portion which related to the custody of the child. A decree of divorce made in a foreign country without regard to domicile may according to the law of that country be valid within the limits of that country; but to a divorce so pronounced the Courts of Northern Ireland deny validity within their jurisdiction. At common law the father as the natural head of the family enjoyed rights regarding the custody of his children which were superior to those of the mother, however young her child might be. The rigour of the law was modified by statute, and the right of the parents are now governed by the provisions of section 5 of the Guardianship of Infants Act, 1886, which declares that the Court is to have regard to, (*a*) the welfare of the infant; (*b*) the conduct of the parents; and (*c*) the wishes as well of the mother as of the father. *Held also* (reversing Best, L.J.), that, the welfare of the infant being the principal consideration, the mother's claims to the custody of their child were superior. *In re O'Hara* [1900] 2 I.R. 232, applied. The conditional order of *habeas corpus* was therefore made absolute, and the Court directed that the child should be handed over in Court to the custody of the applicant. *In the Matter of E. E. L. an Infant.* [K.B.D. 56

INSURANCE (MOTOR)—ACCIDENT—*Happening of accident in front of owner's residence and away from public highway and while driver had alighted from car for temporary purpose—Liability in respect of which no obligation to insure imposed by statute—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 15), *section* 18. A voluntary passenger was injured in an accident in a private motor car. The driver of the car had arranged to drive his mother, the voluntary passenger. The driver brought the car to the front door of his mother's house, away from the public road. He than alighted and left the car for some temporary purpose. In the meantime the passenger got into the car. There was a slight fall in the ground and as the hand brake had not been effectively applied, the car moved down the incline. The passenger became alarmed and jumped out and fractured her ankle and received other injuries. The passenger's husband and father of the driver held a private motor car insurance policy. The insurance policy covered liability to passengers for accidents, and there was an endorsement on the policy extending the cover to accidents while the car was in the charge of the insurer's son, the driver of the car. The voluntary passenger sued her son, the driver of the car, for damages. No defence was entered in the action. Interlocutory judgment was marked, and a sheriff's jury fixed damages at £25 with costs amounting to £38 15*s.* 5*d.* The insurance company repudiated liability. The voluntary passenger, the plaintiff in this action, applied for an order under section 18 (1) of The Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, against the insurance company for payment of the amount payable under the judgment she had obtained. *Held*, by Brown, J., (*a*) that the policy was wide enough to cover the accident; (*b*) that the son was in charge for the purpose of driving the car. The motion was accordingly granted. *Ferguson v. Ferguson.* [K.B.D. 126

INTOXICATING LIQUOR ACT—NEW LICENCE—TWENTY-FIVE PER CENTUM OF POPULATION 10
See LICENSING LAW.

JURISDICTION—SERVICE OUT OF—ACTION FOR BREACH OF CONTRACT 162
See PRACTICE (4).

LAW NOT IN RESPECT OF TRADE—VALIDITY . 21
See MILK AND MILK PRODUCTS ACT.

LICENCE FOR PUBLIC ENTERTAINMENT—RENEWAL—SIX OR SEVEN DAY LICENCE—VARYING 42
See HALL.

LICENCE FOR SALE OF MILK—PREMISES OUTSIDE NORTHERN IRELAND—LAW NOT IN RESPECT OF TRADE 21
See MILK AND MILK PRODUCTS ACT.

LICENCE, NEW—INCREASE OF TWENTY-FIVE PER CENTUM—WHETHER CITY OR WARD OR BOTH—CERTIFICATE OF MINISTER OF HOME AFFAIRS—EFFECT 10
See LICENSING LAW.

LICENCE—RENEWAL—APPEAL 1
See MANDAMUS.

LICENSING LAW—NEW LICENCE—INCREASE OF TWENTY-FIVE PER CENT. *of population—Whether city or ward—Certificate of Minister of Home Affairs—Effect of—Certiorari—Delay in bringing proceedings—Intoxicating Liquor Act (Northern Ireland)*, 1923, (13 & 14 *Geo.* 5, *c.* 12), *section* 9 (*c*), *Intoxicating Liquor Act (Northern Ireland)*, 1927, *section* 3 (6) (*iv*). R. applied to the Recorder of B. under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by the Intoxicating Liquor Act (Northern Ireland), 1927, section 3 (6) (*iv*), for an ordinary licence for the sale of intoxicating liquor for consumption or or off the premises. He proved the extinction of two licences in the city and produced a certificate of the Minister of Home Affairs showing an increase of twenty-five per cent. in the population of St. A.'s Ward of the city in which ward the premises were situate. The prosecutor objected to the certificate that it should show not only an increase in the ward but also a twenty-five per cent. increase in the population of the city. The Recorder, after reserving judgment, held that the certificate was conclusive as to the twenty-five per cent. increase in the population of the ward but was not conclusive as to whether, for the purpose of such increase, the unit should be the ward or the city. He further held that the proper unit was the ward, and granted the licence, the applicant undertaking to expend on the premises a further large sum of money. Nearly five months after the granting of the licence the prosecutor obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division, for the purpose of being quashed, the order made by the Recorder, on the grounds (*a*) that the order was made without and in excess of jurisdiction; (*b*) that it was made without due regard to the provisions and requirements of the above-mentioned Acts; and (*c*), that the order was made without any statutory or other authority. In the meantime the applicant had spent on the premises a large portion of the money he had undertaken to expend and had entered into a contract for a further large expenditure. On application to make the conditional order absolute, notwithstanding cause shown: *Held*, by the King's Bench Division (Brown, J., and Megaw, J.), reversing the Recorder, that section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, meant that there must be an increase of at least twenty-five per cent. in the population of a city or town before a new licence could be granted, and that in addition, the licence could only be granted in respect of premises situate in the ward or district electoral division in which such increase in population had taken place. *Held*, also, that as no step was taken by the prosecutor to obtain a conditional order for certiorari until nearly five months after the licence had been granted, the prosecutor was debarred by his delay from succeeding in his application, and that the conditional order should be discharged. *The King (Rainey) v. Recorder of Belfast.* [K.B.D. 10

MANDAMUS—ALTERNATIVE REMEDY BY APPEAL TO COUNTY COURT—*Hall used for public dancing, singing, music, boxing and other public entertainments—Renewal of licence—Less than seven days previous notice of objections—Local Government Act (Northern Ireland)*, 1934, (24 & 25 *Geo.* 5, *c.* 22), *section* 31 (7), (11). The prosecutor, the secretary of the C. D. Hall, situate in P., which had been duly licensed in accordance with section 31 of the Local Government Act (Northern Ireland), 1934, applied to the U. D. Council of P., the licensing authority under said section for a renewal of the licence. The prosecutor received

notice from the Clerk of the Council that an objection had been taken to the renewal of the licence. The notice was less than the seven clear days required by the said section. Notwithstanding the protest of the prosecutor's solicitor the Council heard the objection and refused the application, neither the prosecutor nor his solicitor taking part in the hearing. The prosecutor obtained a conditional order for a writ of mandamus to issue commanding the Council to grant a renewal of the licence. On motion to make the conditional order absolute, notwithstanding cause shown. *Held*, by the King's Bench Division (Brown, J., and Megaw, J.), that the Council had not given a proper notice as required by the section, but that the prosecutor was not entitled to an order of *mandamus*, because he had another effective remedy, viz., by appeal to the county court, and that therefore the conditional order should be discharged. *The King (Quinn) v. Portadown U. D. C.* [K.B.D. 1

MERCHANDISE MARKS—INDICATION OF ORIGIN—EMPIRE PRODUCE—IMPORTED GOODS—NAME OR TRADE MARK *of Manufacturer or Trader in the United Kingdom*—"*Conspicuously*"—"*Empire*"—*Whether Word must be used alone*—"*The Produce of the Finest Pastures in the British Empire*"—*Whether sufficient Indication of Origin*—*Merchandise Marks Act*, 1926 (16 & 17 *Geo.* 5, *Ch.* 53), *sections* 1 (1), 10 (1)—*Merchandise Marks* (*Imported Goods*) *No.* 1 *Order*, 1932, *Article* 3 (*a*). Section 1 (1) of the Merchandise Marks Act, 1926, provides that "It shall not be "lawful to sell . . . in the United "Kingdom any imported goods to "which there is applied any name or "trade mark being, or purporting to "be, the name or trade mark of any "manufacturer, dealer or trader, or "the name of any place or district in "the United Kingdom unless the name "or trade mark is accompanied by an "indication origin.' By section 10 (1) "Indication of Origin," means, at the option of the person applying the indication, either—(*a*) in the case of goods manufactured or produced in any part of His Majesty's Dominions outside the United Kingdom the word "Empire" or, (*b*) a definite indication of the country in which the goods were manufactured or produced; the indication being given in either case, conspicuously. By Article 3 (*a*) of the Merchandise Marks (Imported Goods) No. 1 Order, 1932, indication of origin shall be marked indelibly and in a conspicuous manner in plain block letters not less than one-twelfth of an inch in height. The respondents, who carried on business at Newtownstewart, Co. Tyrone, Northern Ireland, sold butter produced in Australia wrapped in a wrapper at the top of which were the words in small block letters more than one-twelfth of an inch in height: "The Produce of the Finest Pastures "in the British Empire." The centre of the wrapper bore the words in large letters: "The Famous Mourne Valley "Brand"; "Pure Pasteurised "Butter," and below in small letters was the name and address of the respondents. The magistrate held that the words: "The Produce of the "Finest Pastures in the British "Empire" were an indication of origin as required by the said Act. *Held*, that the wrapper did not comply with the provisions of the Statute and that the finding of the resident magistrate was wrong in law. *The King (Moore) v. Newtownstewart Model Dairy, Ltd.* [K.B.D. 94

MILK AND MILK PRODUCTS ACT (NORTHERN IRELAND), 1934 (24 & 25 *Geo.* 5, *c.* 16), *sections* 1 (1) (*c*), 2 (2), 8 (1), 9 (1)—*Statutory Rules and Orders of Northern Ireland*, 1934, *No.* 71, *Regulations* 5, 6, 7, 8, 9, 22 (1), (4)—*Licence for sale of milk*—*Licence not obtainable by persons whose land or premises are outside Northern Ireland*—*A law not in respect of trade, but for peace, order and good government in respect of precautions to secure health of inhabitants*—*Validity of Act*—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *section* 4 (1), (7). The Milk and Milk Products Act (Northern Ireland), 1934, provides that a person shall not sell milk except under and in accordance with the Act (section 1 (1) (*c*); that a person shall not sell milk of grade A, B or C, (defined by the Act) unless he holds either a producer's or a distributor's licence (section 2 (1)); that the Ministry of Agriculture shall on application made in the prescribed manner grant to any person on the prescribed conditions a licence, and that the holder of a licence shall keep milk records and furnish such returns as the Ministry may require and permit the records to be inspected by

an authorized officer (section 2 (6)). The Act further provides that an authorized officer shall have power to enter and inspect at any reasonable time any part of the land or premises occupied by the holder of a licence in connection with his business and examine milk found there and take samples (section 8 (1)). Power to make regulations is given to the Ministry of Agriculture by section 9 (1). Regulations governing the production and sale of milk of grade C quality were made by the Ministry (S. R. & O., Northern Ireland, 1934, No. 71). These regulations provide that a producer shall permit any authorized officer at any reasonable time to inspect the herd and examine all premises and equipment used by the producer in connection with the production or sale of milk (regulation 5), and contain other provisions as to things to be done and powers to be exercised on the premises (regulations 6, 7, 8, and 9). There is a regulation that the Minister before granting a producer's licence shall satisfy himself that the applicant's arrangements for dealing with milk—that is arrangements for the production, handling, storage, treatment, and distribution of milk—are such as will enable him to comply with the provisions of the Act and regulations (regulations 22 (1) and (4)). The appellant was one of several farmers whose farms are situate in County Donegal, outside the territory of Northern Ireland. He was convicted at the Londonderry Petty Sessions for having sold milk in the City of Londonderry otherwise than in accordance with the above Act. He appealed from that decision to the Recorder of Londonderry who affirmed the decision of the justices on the ground that section 2 of the Milk and Milk Products Act (Northern Ireland), 1934, requiring a licence for the sale of milk in Northern Ireland applies to milk coming from outside Northern Ireland even where the producer had not obtained a licence to sell milk in Northern Ireland. The appellant appealed to the Court of Appeal in Northern Ireland by virtue of section 50 of the Government of Ireland Act, 1920, and section 1 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2). The Court of Appeal (1) dismissed the appeal and the appellant appealed to the House of Lords. The House of Lords (2) affirmed the judgment of the Court of Appeal, holding (*a*) that the Milk and Milk Products Act (Northern Ireland), 1934, must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory, and (*b*) that the true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland ; and in those circumstances though it may incidentally affect trade with County Donegal, it is not passed " in respect " of trade and does not offend against " the express limitations imposed by section 4 (1), (7) of the Government of Ireland Act, 1920. Order of the Court of Appeal in Northern Ireland (3) affirmed. *The King (Lynn) v. Gallagher.* [H.L. 21

MOTION TO REMIT—Payment into Court 88
See Practice (1).

NEGLIGENCE—Payment into Court 88
See Practice (1).

NOTICE OF OBJECTIONS—Length of—Appeal to County Court 1
See Mandamus.

NUISANCE — Owners — Agents — Public Health (Ireland) Acts 144
See Dwelling House.

ORIGIN—Indication of—Empire Produce 94
See Merchandise Marks.

OWNER — Agent — Nuisance — Public Health (Ireland) Acts 144
See Dwelling House.

OWNER-MANAGER—Compensation 174
See Road and Railway Transport Act.

PAYMENT INTO COURT—Motion to Remit 88
See Practice (1).

PAYMENT INTO COURT—Recovery of Same Amount—Costs 158
See Practice (2).

PENSIONS, ALLOWANCES AND GRATUITIES—RATEABLE DEDUCTIONS—GARNISHEE .. 50
See PRACTICE (3).

PRACTICE (1)—ACTION FOR NEGLIGENCE—PAYMENT OF MONEY INTO COURT—MOTION TO REMIT—*Whether payment of money into Court deprives defendant of right to move to remit—R. S. C. (N.I.) 1936, Order 22, r. 1.* The plaintiff brought an action for negligence during the Long Vacation and the defendants attempted to lodge money in Court in accordance with Order 22, r. 1. They were unable to do this as the Accountant-General's office was closed. The defendants then applied to the Vacation Judge who made an order giving the defendants leave to lodge the money and authorising the Registrar to receive it and return it pending the opening of the Accountant-General's books. On the hearing of a motion to remit the action, Andrews, L.J., made an order remitting the action and transferring the money lodged in Court to the County Court. The plaintiff appealed to the Court of Appeal. *Held*, by the Court of Appeal (Best, L.J., and Brown, J.), that the lodgment of the money in Court deprived the defendant of the right to move to remit the action as the defendants by so lodging the money had recognised and accepted the jurisdiction of the High Court. *Luke v. Eglinton Bakery, Ltd.* [C.A. 88

PRACTICE (2)—COSTS—PAYMENT INTO COURT WITH DENIAL OF LIABILITY—RECOVERY OF SAME AMOUNT AS PAID INTO COURT—*Plaintiff's right—Order XXII, rr. 1 (1), (3), 4.* In an action to recover damages for injuries resulting from the negligence of the defendant, he denied the negligence and paid a sum of money into Court with a denial of liability. The plaintiff did not accept the money paid into Court in satisfaction of his claim, and the action went to trial. At the trial the jury found that the defendant was guilty of negligence and that the plaintiff was not guilty of negligence, and they assessed the damages at £200, which was exactly the same amount as had been paid into Court. *Held*, by the trial judge (Andrews, L.J.), that the sum lodged in Court by the defendant while denying liability should be paid out to the plaintiff in satisfaction of the damages; *Held*, *also*, that the plaintiff should have the costs of the action up to the lodgment of the sum of £200 and also the costs of the issues of negligence and contributory negligence treated as separate issues, whilst the defendant should have the general costs of the action after such lodgment; and that the Taxing Master should set off the costs awarded to the plaintiff against the costs awarded to the defendant and should certify the balance, and that judgment should be entered for such balance of costs for the party in whose favour such balance should be found. *Maidment v. Maxwell.* [K.B.D. 158

PRACTICE (3)—EXECUTION CREDITOR—GARNISHEE—"RATEABLE DEDUCTIONS" FROM POLICE CONSTABLE'S PAY—*Whether rateable deductions attachable as debt—Trust moneys—Rateable deductions different from "pensions" "allowances and gratuities"—Royal Ulster Constabulary Pensions Order, 1923, Articles 2, 7, 17 and 20 (1)—Schedule to the Pay Order, 1922—R.S.C. Northern Ireland, Order 45.* By an Order made on 9th November, 1936, it was directed that R. M. should recover against R. D., the prosecutor, her costs of the order when taxed. These costs were duly taxed at the sum of £39 9*s.* 2*d.*, and the whole sum remained unsatisfied. Subsequently a conditional order of garnishee was obtained by R. M., attaching certain moneys in the hands of the Ministry of Home Affairs payable to R. D. in respect of a refund of deductions made from his pay while serving as a member of the Royal Ulster Constabulary, towards the Constabulary Pension Fund. R.D. had been a constable in that Force but had voluntarily resigned. The moneys payable to him amounted to £151 10*s.* 10*d.*, representing "rateable deductions" from his pay made while he was a member of the Force. Article 20 (1) of the Royal Ulster Constabulary Pensions Order, 1923, provides that "where a member "of the Force, not having been "dismissed or required to retire as an "alternative to dismissal, leaves the "force without a pension or gratuity, "the Ministry, except where the member leaves in such circumstances as "will enable him to reckon his "approved service in the force for the "purpose of pension, shall pay him "the whole of the rateable deductions

" which have been made from his pay, " and any bounty repaid by him under " Article 14 shall be similarly repaid." On an application to make absolute a conditional order of garnishee, cause having been shown. *Held*, by Andrews, L.J. (*a*) that the " rateable " deductions " constituted a debt liquidated in its nature, although the precise amount had not been definitely ascertained when the conditional order of garnishee was obtained, and that such debt was attachable ; (*b*) that such deductions were not trust moneys ; (*c*) that they were essentially different from " pensions, allowances, or gratu- " ities " which, under Article 17, could not be assigned or charged. The cause shown was therefore disallowed and the conditional order made absolute. *The King* (*Robinson Devlin*) *v. County Court Judge of Fermanagh.* [K.B.D. 50

PRACTICE (4)—Service of Writ of Summons out of the Jurisdiction—*Order XI, rule* 1 (*e*) (*iii*)—Action for Breach of Contract—*Whether order giving liberty to serve Writ of Summons out of jurisdiction made without jurisdiction—Whether order only intended to apply to cases where different systems of law prevail—" The action is one brought to enforce . . . or otherwise affect a contract . . by its terms or by implication to be governed by the law of Northern Ireland."* The plaintiff brought an action for the recovery of the sum of £78 7*s*. 4*d*., being the balance alleged to be due by the defendants who carried on business in London to the plaintiff, an egg and poultry merchant residing at K., in the County of Armagh. The action was brought in respect of a contract for the sale of turkeys by the plaintiff to the defendants. It was admitted that the contract was made in England by the telegraphic acceptance from London of plaintiff's offer to sell to the defendants a supply of turkeys. These turkeys were to be delivered by the plaintiff f.o.b., Belfast, for despatch to London. It was also admitted that the contract was to be wholly performed in Northern Ireland. Three consignments of turkeys were in dispute. The first of these, valued at £34 14*s*. 10*d*., the defendants refused to accept in London, on the ground that they arrived late. The second consignment, valued at £31 13*s*. 1*d*., was alleged to have arrived in bad condition, and the third, consisting of one case of turkeys, valued at £12 0*s*. 10*d*., was alleged not to have arrived at all. Brown, J., gave liberty to issue and serve a writ of summons in the action out of the jurisdiction. The writ was accordingly issued and subsequently a notice of motion to set aside the order of Brown, J., was served. Before the motion to set aside the order came on for hearing the plaintiff died. The action was afterwards revived, but no further step was taken for almost three years when the plaintiff served notice of intention to proceed. The defendant then caused his motion for service out of the jurisdiction to be re-entered. Order XI., rule 1 (*e*) (iii) of the Rules of the Supreme Court (Northern Ireland), 1936, provides that " Service out of the jurisdiction " of a writ of summons or notice of a " writ of summons may be allowed by " the Court or a Judge whenever (*inter* " *alia*) the action is one brought to " enforce . . . or otherwise affect, a " contract, . . . by its terms or by " implication to be governed by the law " of Northern Ireland." *Held*, by Andrews, L.C.J., (*a*) that Order XI., rule 1 (*e*) (iii) is not confined in its application to cases in which different systems of law prevail in Northern Ireland and in the other country ; but (*b*) that the contract sued upon was not one which, by its terms or by implication, was to be governed by the law of Northern Ireland within the meaning of these words as contained in the rule ; and, accordingly, that the defendant's motion to set aside the order of Brown, J., giving liberty to issue and serve the writ of summons out of the jurisdiction, must be granted. *Clarke v. Harper and Robinson.* [K.B.D. 164

PROBATE—Wills of Same Date—Inconsistency .. 130
See Wills.

PROPERTY—Meaning of .. 104
See Road and Railway Transport Act.

PUBLIC AUTHORITIES PROTECTION ACT—Corporation—Continuing Injury .. 137
See Damage.

PUBLIC HEALTH (IRELAND) ACTS—Nuisance—Owner—Agent 144
See Dwelling House.

RATEABLE DEDUCTIONS—GARNISHEE—PENSIONS, ALLOWANCES AND GRATUITIES .. 50
See PRACTICE (3).

REMITTING MOTION—PAYMENT INTO COURT 88
See PRACTICE (1).

ROAD AND RAILWAY TRANSPORT ACT (*Northern Ireland*), 1935 (2), (25 & 26 *Geo.* 5, *c.* 15) *Special Case stated for opinion of Supreme Court—Road and Railway Transport Act* (*Northern Ireland*), 1935, *section* 7 (4)—*Establishment of Road Transport Board and transfer of existing road transport undertakings—Provisions for Compensation—Road and Railway Transport Act* (*Northern Ireland*), 1935, *section* 6 (*c*)—*Validity—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sections* 4 *and* 5—*The Parliament of Northern Ireland shall not make a law so as either directly or indirectly to take any property without compensation*—"*Special circumstances*" *section* 6 (*c*)—*Effect of provision that* "*the* "*tribunal shall have regard to all the* "*circumstances of the case*"—*Section* 9 (1) (*a*)—*Proper basis of compensation where undertaking acquired from owner-manager—Method of determining consideration payable for transferred undertakings*—"*Property*" *meaning of, in Government of Ireland Act*, 1920, *sec.* 5 (1). In the year 1925 the claimant commenced the business of a road motor undertaking for passenger transport. Subsequently he also engaged in the business of a funeral undertaker and taxi proprietor. All these activities were still being carried on by him when the Road and Railway Transport Act (Northern Ireland), 1935, came into effect. The principal object of that Act was to provide for the establishment of a Road Transport Board for Northern Ireland, and for the transfer to that Board of various road transport undertakings. Section 4 provided that it should be the duty of the Board so to exercise their powers as to secure a system of transport properly co-ordinated and giving efficient, economical and convenient transport services to the public. The procedure for the transfer of transport undertaking was prescribed by section 5 of the Act, and in compliance with these provisions, a notice was duly served upon the claimant intimating that the Board would acquire his road motor undertaking. Such undertaking was to be transferred and to vest in the Board on 3rd December, 1935. The claimant's activities as taxi proprietor and funeral undertaker were excluded from the scope of the Act by the provisions of section 15 (4) (*a*) and (*g*), and the notice only affected his road motor undertaking. The prescribed vesting order was made and after negotiations for a settlement had failed, the claimant gave notice to the Board requiring his claim to be heard by the Arbitration Tribunal set up under the Act. Schemes for the compensation payable to the claimant were duly lodged by the Board and the claimant, in accordance with the provisions of the Act and the rules which had been made. The offer of the Board contained in their scheme amounted to £22,355. Of this sum £6,905 represented the consideration for physical assets, payable as to £5,000 in cash, and as to £1,905 in Transport A1 Stock, whilst the remaining £15,450 represented the consideration for goodwill, which it was proposed to discharge by issuing to the claimant Transport B Stock of the nominal value of £15,450. The consideration demanded by the claimant amounted to £45,026, of which £9,916 represented physical assets, whilst the claim for severance amounted to £1,550, and goodwill to the balance of £33,560. Nothing was stated in the claimant's scheme in regard to the proposed method of payment. The claimant declined to accept the offer of £22,355, and requested in pursuance of Regulation No. 2 of the Road Transport Arbitration Regulations, 1936, that the amount of consideration payable should be determined in accordance with the provisions of the Act. The arbitration was afterwards held and various submissions were made on behalf of the respective parties. As a result of these submissions a Special Case was stated for the opinion of the Supreme Court under section 7 of the Road and Railway Transport Act (Northern Ireland), 1935. This Special Case contained several questions which it was desired should be answered by the Court. Amongst these questions were: (*a*) whether in view of the provisions of section 5 (1) of the Government of Ireland Act, 1920, providing that the Parliament of Northern Ireland shall not make a law so as

either directly or indirectly to take any property without compensation, the provisions of section 6 (*c*) of the Road and Railway Transport Act (Northern Ireland), 1935, which provide for part payment in stock, are valid; (*b*) whether in respect of so much of the consideration as exceeds £5,000, is such difference a special circumstance within the meaning of section 6 (*b*) which might justify the payment in cash of the whole or part of such excess; (*c*) whether the extent to which the market value of Transport Stock is below its nominal value is one of "the circumstances of the "case" within section 9 (1) (*a*); (*d*) where an undertaking is acquired from an owner who himself managed his own undertaking, is such an owner being compensated in accordance with the proper principles of law if the consideration is fixed without regard to the loss by him after acquisition of so much of the profits as, had he not been the owner would have represented a fair remuneration to him for his services as manager; (*e*) was there evidence upon which the tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board; (*f*) whether the method of determining the consideration payable for transferred undertakings pursued by the Tribunal, was correct, or whether the Tribunal should determine the consideration payable on the basis of the value of the transferred undertaking as a going concern as between a willing seller and a willing purchaser. *Held*, by the Court of Appeal (Andrews, L.J., Best, L.J., and Brown, J.):—(*a*) that nothing in either section 4 or section 5 of the Government of Ireland Act, 1920, renders invalid the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, in reference to payment of compensation in stock, and that such provisions are *intra vires* the Parliament of Northern Ireland; (*b*) that the difference between the market value and the nominal value of the stock is a "special circumstance" within the meaning of section 6 (*c*); (*c*) that the extent to which the market value of Transport Stock is below its nominal value may be regarded as a circumstance of the case within section 9 (1) (*a*) though when properly open for consideration by the Tribunal under section 6 (*d*) the Tribunal should deal with the question as a special circumstance under that section rather than as a "circumstance of the case" under section 9 (*a*); (*d*) that in a manager-owner business there must be some expense of management, and it is the duty of the Tribunal in assessing compensation for loss of goodwill in such a case to make a deduction from profits in respect of management expenses, of such a reasonable sum as upon the evidence and in all the circumstances of the particular case would constitute a fair remuneration for the owner's management of the undertaking; (*e*) that there was evidence upon which the Tribunal should have considered the loss suffered by the claimant by reason of the severance of his business as a funeral undertaker and taxi proprietor from his road motor undertaking acquired by the Board; (*f*) that it would be wrong to value a transferred undertaking compulsorily acquired under the Act as if it were being sold by a willing seller to a willing purchaser, and that the owner is entitled to be compensated on the basis of the value of the undertaking to him, and not upon what its value may be to the purchaser. *O'Neill v. Northern Ireland Road Transport Board.* [C.A. 104

ROAD AND RAILWAY TRANSPORT ACT (*Northern Ireland*), 1935 (25 & 26 *Geo.* 5, *c.* 15) (1) *Special Case Stated for opinion of Supreme Court—Establishment of Road Transport Board and transfer of existing road transport undertakings—Provisions for compensation—Whether Road Transport Arbitration Tribunal empowered to grant compensation in case of an owner-manager for loss of employment and on what basis, where undertaking transferred to Road Transport Board—Road and Railway Transport Act* (*Northern Ireland*), 1935, *section* 36. In the year 1921 the claimant commenced business as a haulier and carried it on from that date until the undertaking was acquired by the Road Transport Board on 3rd June, 1936. In May, 1922, his brother joined him in the business and from that date until 3rd June, 1936, the business was carried on by the claimant and his brother with some help from a sister. The claimant had a steady employment taking up a

considerable part of his time in the working of the undertaking. Under the Road and Railway Transport Act (Northern Ireland), 1935, in the ordinary course the claimant would receive compensation for the value of the physical assets and the goodwill of the business. He would not, under the scheme submitted by the Road Transport Board, be entitled to compensation for loss of employment such as would be given to ordinary employees under section 36 of the Act. The claimant contended that he was entitled to compensation for loss of employment as part of the award to be made by the tribunal. Section 36 (1) of the Act provided that where an undertaking or part of an undertaking was transferred to the Board under the Act, compensation should be payable by the Board to any person who, immediately before the day of transfer of the undertaking or part of an undertaking, was employed by the former undertakers as a whole-time officer or servant in connection with the road transport service of the undertaking. The Act contained no provision providing for compensation in the case of an owner-manager for loss of employment caused by the undertaking having been transferred to the Road Transport Board. Under the provisions of section 5 (2) of the Act the Board served upon the claimant a notice in writing specifying the 3rd June, 1936, as the day on which the claimant's road motor undertaking was to be transferred to and vest in the Board. Under the provisions of section 6 (*d*) of the Act the Board, by letter dated 12th January, 1937, notified the arbitration tribunal that the claimant and the Board were unable to agree as to the amount of the consideration for the transfer of the claimant's undertaking. Under the provisions of section 6 (*e*) of the Act, the Board and the claimant prepared and submitted to the arbitration tribunal schemes setting out the amount and nature of the consideration which the parties respectively considered ought to be accepted by the tribunal as being in accordance with the provisions of the Act. Under the provisions of section 7 (2) of the Act the claimant and the Board with their respective witnesses on 7th January, 1938, appeared and were examined before the arbitration tribunal, and at a sitting of the tribunal on 11th January, 1938, the claimants handed to the tribunal forms of three questions and asked the tribunal to state them by way of a special case for the decision of the Supreme Court. The tribunal refused this request. On 2nd March, 1938, the claimant applied to the King's Bench Division for an order directed to the arbitration tribunal to state a special case. The arbitration tribunal submitted two questions which they had prepared and were willing to state as a special case. The King's Bench Division made no rule on the motion and approved of the form of questions prepared by the arbitration tribunal. The arbitration tribunal stated as a special case for the decision of the Supreme Court under section 7 (4) of the Act the following question of law arising in the course of the proceedings, whether the tribunal are empowered under the Act to grant compensation for loss of employment to the owner by reason of his undertaking being transferred to the Transport Board and, if so, on what basis should the amount of such compensation be determined. *Held*, by the Court of Appeal (Andrews, L.C.J., Best, L.J., and Babington, L.J.), that the tribunal was not empowered either under the general law or under the Road and Railway Transport Act (Northern Ireland), 1935, to grant compensation in the case of an owner-manager for loss of employment by reason of his undertaking having been transferrde to the Road Transport Board. *In the Matter of the Road and Railway Transport Act (N.I.), and In the Matter of an Arbitration between Alexander Lennon and the Northern Ireland Transport Board.* [C.A. 176

SALE OF MILK—LICENCE—OWNERS OF PREMISES OUTSIDE NORTHERN IRELAND—LAW NOT IN RESPECT OF TRADE—VALIDITY 21
See MILK AND MILK PRODUCTS ACT.

SERVICE OUT OF THE JURISDICTION—ACT FOR BREACH OF CONTRACT—JURISDICTION 162
See PRACTICE (4).

SEVERABILITY OF ORDER OF FOREIGN COURT .. 56
See INFANT.

SPECIAL CIRCUMSTANCES—Compensation 104
See Road and Railway Transport Act (2).

STATUTES—
——1 Vic., c. 26, s. 21 132
See Wills.
——8 & 9 Vic., c. 142, s. 85 (Local Act) 137
See Damage.
——56 & 57 Vic., c. 61 .. 137
See Damage.
——41 & 42 Vic., c. 52, s. 2 .. 144
See Dwelling House.
——10 & 11 Geo. 5, c. 67, ss. 4, 5 104
See Road and Railway (2).
——10 & 11 Geo. 5, c. 67, s. 4 (1), (7) 21
See Milk and Milk Products Act.
——13 & 14 Geo. 5, c. 12, s. 9 (c) 10
See Licensing Law.
——16 & 17 Geo. 5, c. 53, ss. 1 (1), 10 (1) 94
See Merchandise Marks.
——17 & 18 Geo. 5, c. 21, s. 3 (6) (iv) 10
See Licensing Law.
——24 & 25 Geo. 5, c. 15, s. 18 .. 126
See Insurance (Motor).
——24 & 25 Geo. 5, c. 16, ss. 1 (1) (c), 2 (2), 8 (1), 9 (1) 21
See Milk and Milk Products Act.
——24 & 25 Geo. 5, c. 22, s. 31 (1), (11) 42
See Hall.
——24 & 25 Geo. 5, c. 22, s. 31 (7), (11) 1
See Mandamus.
——25 & 26 Geo. 5, c. 13, s. 26 (1) 155
See Dwelling House.
——25 & 26 Geo. 5, c. 15, ss. 6 (c) (d), 7 (4), 9 (1) (a) 104
See Road and Railway (2).
——25 & 26 Geo. 5, c. 15, ss. 5 (2), 6 (d) (e), 7 (2) (4), 36 .. 174
See Road and Railway (1).

STATUTORY OBLIGATION TO INSURE—Accident .. 126
See Insurance (Motor).

STATUTORY RULES AND ORDERS—
——R.S.C. (N.I.), Or. 11, r. 1 (e) (iii) 162
See Practice (4).
——R.S.C. (N.I.), Or. 22, r. 1 .. 88
See Practice (1)
——R.S.C. (N.I.) Or. 22, r.r 1 (1) (3), 4 158
See Practice (2).
——R.S.C. (N.I.) Or. 45 .. 50
See Practice (3).
——R.S.C. (N.I.) Or. 79, r. 10 .. 132
See Wills.
—— (1922) No. 68 Schedule .. 50
See Practice (3).
——(1923) No. 29 Articles 2, 7, 17, 20 (1), Schedule .. 50
See Practice (3).
——(1932) No. 1, Article 3 (a) .. 94
See Merchandise Marks.
——(1934) No. 71, rr. 5, 6, 7, 8, 9, 22 (1) (4) 21
See Milk and Milk Products.

STOCK-IN-TRADE AND BOOK DEBTS 83
See Will.

STREET LEVEL — Alteration — Dampness—Liability of Corporation 137
See Damage.

TRADE—Law in Respect of—Validity 21
See Milk and Milk Products Act.

TWENTY-FIVE PER CENTUM—City or Ward 10
See Licensing Law.

VALIDITY—Law in Respect of Trade 21
See Milk and Milk Products Act.

VALIDITY— Property—Law affecting 104
See Road and Railway Transport.

VARYING—Six or Seven Day Licence — Entertainment Licence 42
See Hall.

WELFARE OF CHILD—Custody of Infant 56
See Infant.

WILL—Construction—*Bequest of entire Income and Benefit of Business—Whether Stock-in-trade and Book Debts included.* The testatrix by her will gave all her property to her trustees and after making certain bequests continued with the words " my trustees to permit " my brother C. to have the entire " income and benefit from any business " carried on at 9 Mabel Street, Belfast. " and I give my trustees full power and " authority to carry on the said " business during the lifetime of my " said brother and on the decease of

"my said brother my entire interest "in the premises 9 Mabel Street, and "also in the said business carried on "in the foundry to vest in my nephew "A. absolutely." The business was carried on by the trustees during C.'s life. On the death of C. *Held*, that the terms of the will showed that the gift to C. carried the book debts and stock-in-trade in addition to the goodwill, of testatrix's business and consequently that the stock-in-trade and book debts due at the death of C. passed to A. subject to such obligations as had been incurred in the management of the business during C.'s lifetime. *In re Spence, deceased; Wilkinson v. Arlow and Another.*

[C.D. 83

WILLS—ADMISSION TO PROBATE—WILLS OF SAME DATE—NO EVIDENCE OF PRIORITY OF EXECUTION—SLIGHT INCONSISTENCY. Prima facie every testamentary document which has been duly executed ought to be admitted to probate; but if there are two testamentary documents of the same date, and it cannot be ascertained which of them was executed first, and if their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted and neither document will be admitted to probate, for the reason that, in so far as they are inconsistent with one another they are both void by the common law for uncertainty. The important question to be determined in such a case is whether the inconsistency is such that the two documents cannot stand together, and the Court will endeavour to reconcile differences rather than to look for inconsistencies. A testatrix executed two wills, both dated the same day, their provisions being slightly inconsistent. The evidence of the attesting witnesses proved that on the day prior to the execution of the documents the testatrix declared that she was going to make a new will, and that on the day of execution she declared the two documents to be her will. Both documents were duly signed by the testatrix and attested, the one immediately after the other; but owing to the documents being covered up by the testatrix with a newspaper when they were being executed, the witnesses were unable to say which document was executed first. The only material discrepancy between the two documents was that a legacy of £30 in one of them read £10 in the other. It was clear from examination of the document and from the evidence that the figures "30" were written on an erasure, and it was impossible to tell from the document what the original figures were. *Held*, by Andrews, L.C.J., that neither will was intended to revoke nor did, in fact, revoke the other. Though not absolutely *facsimiles* they should be regarded as falling within the class of wills known as duplicates. Owing to the slight variation in wording, and to the fact that neither could be said definitely to be the original, and the other only a copy, both documents should be admitted to probate, omitting the figures "30" from the second mentioned document so that both might be available for the assistance of the Court, if any question of construction should arise. *In the Goods of Anna Eliza Pilkington, deceased.*

[K.B.D. (Probate) 130

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